



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101264/2020

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Held in Glasgow on 26, 27, 28, 29, 30 October 2020 and 2 November 2020

Employment Judge: L Doherty

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**Ms F McMillan**

**Claimant  
Represented by:  
Ms Davis –  
Solicitor**

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**McMillans Accountants Ltd**

**Respondent  
Represented by:  
Mr Chapman –  
Owner**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

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- (1) the claim of breach of contract succeeds;
- (2) the claim of unfair dismissal succeeds,
- (3) the respondent shall pay the claimant damages in respect of breach of contract and unfair dismissal of **£39,749.50**

### REASONS

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1. The claimant presented a claim of unfair dismissal and breach of contract on the 28 February 2020. The claim was resisted on all grounds. A Preliminary Hearing (PH) for case management purposes took place more before Employment Judge Meiklejohn on 24 June 2020 and a final hearing was fixed over a period of six days.
2. The claimant was represented by her solicitor, Ms Davies and the respondents were represented by Mr Chapman, the owner of the respondent business.

3. In the unfair dismissal claim the issue for the Tribunal is whether the claimant had been dismissed for a potentially fair reason and whether that dismissal was fair in terms of Section 98 of the Employment Rights Act 1996 (the ERA).
4. In the event the Tribunal is satisfied that dismissal was unfair, it requires to consider remedy, which involves the assessment of compensation and whether there should be an adjustment to this on the basis of contributory conduct, the principles to be derived from the case of *Polkey*, mitigation of loss, and failure to comply with the ACAS Code of Practice.
5. In the claim for damages of breach of contract, the issue the Tribunal is whether there had been a breach of contract on the part of the claimant entitling the respondent to dismiss her without notice. In the event that claims succeeded the Tribunal has to consider remedy.
6. For the respondents the Tribunal heard evidence from;
  - Mr Chapman;
  - Mr Chris Lowe- Accountant in the respondent business;
  - Mr James Cassidy- Accountant in the respondent business;
  - Mr Kieran McCafferty- Accountant in the respondent business;
  - Mr John MacArthur-Accountant in the respondent business and Trainee Manager;
  - For the claimant, evidence was given by;
    - The claimant;
    - Mr Gordon McMillan- the claimant's father;
    - Ms Anne Marie Cassidy- Owner of Christina's Home Care, a former client of the respondent business;
    - Mr Gordon Thompson - a former client of the respondent's business.

7. Both sides lodged documentary productions.

### Findings in Fact

8. From the evidence before it the Tribunal made the following findings in the fact.

- 5 9. The respondents are a small accountancy firm. Prior to the claimant's dismissal they had six employees in total. The respondents operate out of small office premises which the public have access to.

- 10 10. Gordon McMillan set up McMillan's Accountants as a sole trader in September 2010. He employed the claimant from the inception of the business, her employment commencing on 1 September 2010. That business was incorporated into the respondent company on 1 May 2014 at which point the claimant's employment transferred to the respondents. Mr Chapman acquired the respondent business on 2 August 2018 by purchasing the share capital of the business.

- 15 11. When Mr Chapman acquiring the respondent business both he and Mr McMillan were legally represented.

12. Negotiations took place between them around the terms under which the claimant was employed by the respondents relative to her notice period.

- 20 13. The claimant entered into an employment contract with the respondent's which she signed on 1 August 2018 which contained the following clause;

*'12.1 In the relation to the period from the date of the signing of this contract to the date following five years later, we may end your employment at any time by giving you not less than 12 months prior written notice. After this date, we may end your employment at any time by giving you no less than three months prior written notice.*

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*12.2 You may end your employment at any time by giving us not less than three months prior written notice.*

*12.3 Nothing in this contract will prevent us from ending your employment, without notice or payment in lieu of notice, in a case of gross misconduct justifying summary dismissal without notice.'*

- 5 14. Mr Chapman had sought a reduction of the period during which the claimant was entitled to 12 months' notice from 6 years to 5 years, and this was agreed by Mr McMillan.
15. Mr Chapman saw the claimant's contract of employment at or about the point when he acquired the business.
- 10 16. The claimant's contract of employment contains a clause dealing with sickness absence, which provides as follows;
- 15 *7.1 If you are absent from work for any reason, you, or someone on your behalf, must inform your Manager by no later than 9:30 am on the first day of absence, explain the reason for your absence and how long he expected to last. When you return to work you must complete, sign and return self-certification form within five days of your return.*
17. When Mr Chapman acquired the business, the claimant was employed under the title of the Client Manager. Her job involved among other things dealing with 'on boarding' for new clients which involved dealing with compliance issues, job management, billing, bookkeeping, dealing with VAT returns, and dealing with payroll.
- 20 18. After Mr Chapman acquired the business, he wanted the claimant to transfer a number of practice management issues to him. The claimant was happy to do this as she understood that he was the new owner of the business.
19. On or around September 2018 Mr Chapman discussed the claimant's role with her and produced an analysis of the claimant's role (R 17). He asked her to transfer accounts to him, which she did.
- 25 20. Mr Lowe was recruited in around September or October 2018 and the claimant transferred VAT return clients to him, but retained two VAT return

clients, Christina's Care Home Services Ltd (Christina's), and Gordon Thomson Hairdressing.

21. Mr Cassidy, Mr McCaffrey, and Mr McArthur were all recruited in around August 2019. With the recruitment of new members of staff, the focus of the claimant's role moved more towards payroll.
22. The claimant booked annual leave over the Christmas 2019 period. She worked from home on 23 and 30 the December. In order to work from home, she has to use her personal mobile phone, as she was not permitted to take the business mobile home. Mr Chapman was aware the claimant was working from home and that she was doing payroll work, which could have included implementing payment of staff wages for Mr Thompsons staff, by accessing his bank account.
23. The claimant returned to work on 6 January. By the beginning of January, the claimant was feeling increasingly isolated in the office. There was little communication between her and the other members of staff. January is a busy period in the respondent's business because of the need to meet tax deadlines and the claimant found this a stressful time.
24. The claimant takes anti-depressant medication. She also suffers from lupus for which she takes medication. The claimant was taking both these types of medications in January 2020.
25. On Monday 20 January the claimant came into work. She had not been well at the weekend with a stomach bug and she was feeling quite stressed. She had decided to come into work however because she was concerned about how busy it was. Mr Chapman approached her and asked her about a spreadsheet she was preparing. He wanted to know from the claimant how many clients were outstanding on the spreadsheet; the claimant felt under pressure and that she was put on the spot, and this caused her to feel stressed and anxious. She told Mr Chapman that she would have to get back to him.

26. On 21 January the claimant came into work. She was not feeling well, and was feeling stressed and anxious. When she went into the office, she was humming to herself. She did that as she felt it offered her something of a defence mechanism against how she was feeling. When she arrived, she went into the kitchen area of the office to make tea. Mr Chapman was in the kitchen area, but they did not speak directly to each other.
27. The claimant then went to her desk, and logged on to her laptop. Shortly after that Mr Chapman approached the claimant at her desk and asked her if she had sent the spreadsheet with the directors' tax returns on it. The claimant said that she had, but then realised that he was talking about a different spreadsheet. She told him that she would send that one to him. The claimant formed the impression that Mr Chapman was not happy about this. Mr Chapman asked her if she was ok. She responded that she was fine. Mr Chapman moved away from the claimant's desk but then returned very shortly and asked her if she was sure there was not something wrong. The claimant felt very uncomfortable and told Mr Chapman that she did not want to discuss matters with him. Mr Chapman continued to stand at the claimant's desk. The claimant felt she was being goaded by him. She raised her voice, and said to Mr Chapman words to the effect '*I am a 36-year-old woman and I will not be spoken to like a schoolchild*'.
28. Mr Chapman then asked the claimant if she wanted to go home. The Claimant said no initially. She then realised that Mr Chapman was telling her to go home. The Claimant gathered up her things and left. As she did so she muttered to herself words to the effect that '*I have built the business up for nine years and this is how I am treated*'.
29. The claimant was absent from work on 22 January as she was unwell.
30. The claimant felt that she had behaved unprofessionally in speaking to Mr Chapman in the way that she had the previous day and she emailed him she at 9.12 am on the 22 January stating;
- 'Apologies, I had a sickness bug at the weekend, and I shouldn't have come into work as I have not been feeling well. I still have sore stomach*

*and swollen glands and I am not able to come in today. It's no excuse for the way I spoke to you yesterday, I sometimes feel ignored in the office. I am not sure if I should interrupt others to pass messages and send emails.'*

5 31. Mr Chapman responded to the claimant's email later that day at 13.48 stating;

*'I'm sorry to hear that you don't feel well.*

*Please can you put on your out of office and set up the email forwarding on to John MacArthur. He will deal with all the emails in your absence.*

10 *All of your work is being covered at this time. There is therefore no need for you to do anything (other than the above). You can therefore focus on getting better.*

*Please don't do any work at your end as this will lead to workload been completed twice and will cause confusion with clients.*

15 *I'm going to give you a quick call as well. This is simply to relay this information in case you are not logged on and therefore don't receive this communication.*

32. Mr Chapman also telephoned the claimant on 22 January and spoke to her briefly, telling her to pass work to Mr McArthur.

20 33. On 23 January the claimant remained unwell. It was her intention to contact Mr Chapman to advise that she was unable to come into work, however Mr McArthur telephoned her before 9:30am asking for work details. He also emailed her asking for information (R28). Mr Chapman had asked Mr MacArthur to cover the claimant's work while she was absent.

25 34. The claimant provided Mr McArthur with the details which he needed. She also told him that she continued to feel unwell and would not be able to come into work. She said she thought it might be the following week before she was able to come back to work. The claimant knew that Mr Chapman sat close to Mr McArthur and she asked him to pass this information on to Mr Chapman, which he did.

35. After the incident on 21 January Mr Chapman spoke to members of staff about what had happened that morning. He also spoke to the office cleaner, Hannah.
36. Mr Chapman asked Mr Lowe to jot down what had happened in case that was  
5 required at another date.
37. Mr Chapman had a brief discussion with Mr McCaffrey at some point about what had happened. At some stage after the events Mr McCaffrey offered his opinion to Mr Chapman that the claimant was under the influence of drugs or alcohol.
- 10 38. Mr Cassidy expressed the view that the claimant was on drink or drugs.
39. Mr Chapman had a discussion with Mr McArthur, in which he related his version of events to Mr Chapman and gave his opinion to the effect that he believed the claimant could have been under the influence of drugs or alcohol.
40. The claimant returned to work on the morning of Friday 24 January. She was  
15 feeling stressed and anxious. Shortly after she arrived Mr Chapman asked the claimant to go into the private meeting room in the office. After the claimant sat down, Mr Chapman told her that he had looked into what had happened on the 21st and to his mind this amounted to gross misconduct. He told the claimant that he had terminated her employment, and he asked her if  
20 she had any questions.
41. The claimant was in shocked and distressed when she heard this. She told Mr Chapman that she was suffering from stress, but he did not engage with this and there was no discussion about it. Mr Chapman told the claimant that he would send her a letter detailing the reasons for her dismissal and that she  
25 would have the chance to appeal. He also asked if she had any questions, to which the claimant did not respond. She was told by Mr Chapman that she could have some time in the office and then she should go and tidy up her things and say her goodbyes to the staff. The claimant waited for a few moments in the office and then did this.



42. On 25 January Mr Chapman sent the claimant a letter outlining the reasons for her dismissal in the following terms;

'SUMMARY DISMISSAL FOR GROSS MISCONDUCT

5 I am writing to confirm to you the Company's decision to terminate your employment with immediate effect for reasons of gross misconduct. This letter details the allegations against you, the basis of the Company's believe that you are guilty of gross misconduct and any other details relating to the termination of employment.

The allegations against you are as follows:

10 The events of 21 January 2020

You arrived at the office late and then proceeded to sing and hum various songs for 20 minutes whilst making a tea/coffee. After 20 minutes you finally sat down at your desk to do some work. I approached you and asked if you could send me over a file. In a very aggressive tone, you snapped at me to say that you'd already sent it to me. I politely expressed that whilst you had indeed sent me a file, it was not the one I was referring to and asked if you would sent [sic] on the file which related to the directors income tax returns which you had been working on. You then rolled your eyes, shook your head and became very expressive with your arms and in a very sarcastic manner said the following – "oooooo is that the file you want. I didn't realise. I'm soooooo stupid. I can't ever do anything right." I then paused and took a moment to assess the situation and determine that you were acting extremely out of character and something was wrong. I then asked you if you were ok. Your response to this was again very negative. You aggressively stated that it was none of my business and you wanted me to leave you alone. You then demanded that I leave your workspace. I then asked you again if everything was ok and said that I believed that something was not ok as you were not acting in a professional manner and in a very peculiar way. You responded again in a very aggressive manner. You said the following – "How dare you speak to me like that. I am a 36-year-old woman and I won't be spoken to in this way".

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I then stopped you midsentence as I had determined that something was seriously not right. Considering the facts, I determined that you were either drunk or on drugs. Realising this, I asked you to go home immediately and stated that we would discuss the situation the following day. At first you refused to go home, however, I could not present you to the clients in your current state and therefore I insisted that you went home. As you were then leaving, I heard you mutter several negative comments.

After you left, I spoke with several witnesses, individually and privately, to learn what they had heard and seen. I was told by several people that you were acting extremely out of character when you arrived that morning. The version of events and opinions that they presented to me confirmed my overall assessment, that you were either drunk or on drugs.

Further to this, you sent me an email the following day accepting that you acted inappropriately. You state that there's "no excuse for the way I spoke to you yesterday".

### 2 Prior verbal warnings

On 2 other separate occasions, you have spoken to me in an appalling manner. On both occasions, we subsequently spoke about the events and you accepted that you'd acted in a poor manner and apologised. I provided you with a verbal warning each time and said you must conduct yourself in a more professional manner and you must not speak to me in that way again.

### Failure to attend work on 23 January 2020

On 23 January 2020, you did not come into work. Nor did you call into the office, or email to explain your reasoning for your non-attendance. Your calendar states that you were due in the office that day. You had critical workload that needed to be completed on this day and the business was left in a terrible position of not being able to complete this work as you are the only person who is able to provide payroll services.

This caused major operational issues.

Excessive and Deliberate poor performance

I've been keeping a track record of your performance for a long time – both prior to the previous business owner leaving and after. You have always been prone to making mistakes, however, initially my attitude towards these were very lenient, accepting that everybody makes the odd mistake. I've always expressed to you that it was ok, but it was important that you learned from the mistake and tried your best not to make the same mistake again. Since your father left the business, the number of mistakes has progressively increased over time. Further to this, the severity of the mistakes has also significantly increased over time. Your actions and mistakes have caused monetary and reputational damage to the business. On numerous occasions, I've had to appease clients who you've upset with your mistakes and bad attitude.

I've been keeping a spreadsheet logging your actions. I currently have a list over 50 lines long. Unfortunately, due to time constraints, I won't be able to describe all of these. Some of the more significant points are as follows:

- Talking unprofessionally to a client after making a mistake and telling them that you were prone to making mistakes and they should be checking your work
- Not processing the pay for a client's staff thereby leaving a client's staff without pay for the period you were on holiday
- Misplacing approximately £4,000 of a client's money from their bank account
- Continually giving away your time for free, despite being told not to. As an accounting firm, the product that we sell is our time, however, you seem to have no respect for this fact.

It is clear to me that you are unhappy in your role and it is my strong opinion that the mistakes you are making are deliberate.

cancelling our organised outsource resource

As an accounting firm you'll be aware that we are extremely busy in January. It was explained to you that we had too much work on our "To Do" list and would struggle to get it all completed within the deadlines. I had therefore arranged an outsourcing option to accommodate this workload. There was still a large amount of work that the team needed to complete and were working much longer hours to complete this. Bringing in the outsourced resource would give us some additional capacity.

A few days before the outsource was due to complete this workload, you expressed that you didn't want this individual to complete the work. I asked you why and you couldn't provide me with a reason. You simply stated that you didn't want them a part of our business. I told you again about our high volume of work at this crucial point in our business calendar and that we needed this additional resource to join the team. You then told me that you wouldn't be coming into work the following week as a result. I told you that this was unacceptable as this would leave us a team member down.

You then cancelled the outsource, thereby causing significant operational issues.

Passing on a client's confidential banking information

We have a client who has entrusted you with his banking details. When I previously learned of this, I told you that those details were confidential and should never be shared with anyone else, including myself, without the express permission of the client.

It has come to my attention that you have shared that information with another individual. This has caused several legal and professional issues which I will need to resolve with the client.

I have in my possession an email confirming evidence of this fact.

Actions preventing client from accessing their bank account

5 You have taken steps that have prevented a client from accessing his own bank account. His access has been prevented at a time in which he is away on holiday for one month. This has caused major issues with the client.

I have in my possession a text message from you confirming evidence of this fact.

10 Having considered the situation in detail, I have reached the conclusion that you are guilty of gross misconduct and consequently I confirm that your employment is terminated without notice with immediate effect. Your last day of service will, therefore, be Friday 24 January 2020.

15 According to our records, you have taken 16 days holiday in this holiday year and have accrued a holiday entitlement of 16 days up until the date of your termination. There is therefore no payment needed nor refundable in relation to your holiday entitlement.

Your P45 will be forwarded to you in due course.

20 You have the right to appeal against the decision to dismiss you for gross misconduct. Any appeal should be sent in writing to myself by 8 February 2020. This appeal should set out, in detail, the grounds on which you are appealing this decision. Lodging an appeal will not delay this dismissal but if your appeal is upheld you will be reinstated, and your salary will be backdated accordingly.

Lastly, I'd be grateful if you'd send back the shop keys."

43. The claimant had never received a verbal warning from Mr Chapman in the  
25 course of her employment.

44. In the course of her work the claimant has from time to time made errors. She had discussions with Mr Chapman from time to time about issues arising from work. These discussions were not conducted in the context of disciplinary action being taken against the claimant, or a performance review of her work.

45. One of the respondent's clients whom the claimant retained until the termination of employment was Christina's Home Care Services Ltd (Christina's), which was owned by Ms Ann Marie Cassidy. The claimant and Ms Cassidy had worked together for a number of years, and while from time to time and Ms Cassidy could be difficult, she considered that she and the claimant had a good working relationship. The claimant undertook payroll work for Christina's. This could be a challenging and dynamic task due to the nature of the business, and the fact that the shifts workers undertook were subject to considerable and last-minute change. It was important to Christina's that their workers were paid accurately and on time. Christina's sent the payroll information to the respondents over a number of emails, at least in part because of the last-minute changes in workers hours. The claimant could feel under pressure doing this work and from time to time she felt Ms Cassidy difficult. She occasionally had difficult conversations with Ms Cassidy on the telephone. At one stage the claimant told Ms Cassidy that she should check the payroll summaries which she sent her before she paid her employees. Ms Cassidy did not consider this was something which she should have to do.
46. At some point Ms Cassidy spoke to Mr Chapman about her concerns about how the work was being done and that she felt the claimant needed support in carrying out her payroll work.
47. Mr Chapman and Ms Cassidy met at some point and Mr Chapman produced a procedure or protocol for the conduct of Christina's payroll work. This is produced at R37. It provided among other things that pay day was last Friday of every month and that Christina's would provide the respondents with the details required for the payroll in one email on the Thursday before that, by 10am. Ms Cassidy agreed this procedure, but she advised Mr Chapman that all of the information may not come in one email.
48. The claimant had concerns about how this procedure would work in practice, and the fact that information was sent by Christina's over a large number of emails, and this impacted on how the work could be done. She raised these

concerns with Mr Chapman, but his position was that the payroll procedure should be adhered to.

49. In practice the agreed procedure was never followed because of the way Christina's provided the payroll information.

5 50. In December of each year Ms Cassidy did not wish to pay her staff up to the end of the month as she considered this this could cause problems with absenteeism. The procedure which was in place was that her staff were paid for the first three weeks in December and an adjustment was then made in the January payroll.

10 51. Ms Cassidy agreed with the claimant that in December 2019 staff would be paid for the first three weeks of December, with an adjustment to the payroll in January. The claimant organised Christina's payroll for December before she went on leave over the Christmas period.

15 52. When the claimant was absent from work in January, Mr McArthur had a difficult conversation with Ms Cassidy about the January payroll for Christina's in which she expressed unhappiness about the January payroll work.

53. One of the claimant's responsibilities was onboarding new clients which required her to deal with compliance issues. Mr Chapman on occasion spoke to the claimant about the number of clients whose details for onboarding remained outstanding on a spreadsheet. The claimant explained to him that this was because she required compliance information which was not always readily forthcoming. She asked Mr Chapman to try to obtain this information when the clients were signed up in the first instance. Mr Chapman asked the claimant to remove these clients from the spreadsheet, but she told him that she could not do this because of the need to obtain the compliance information.

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54. On one occasion the claimant was asked by Mr Chapman to shred files. Time was set aside for this task. Before shredding the files, the Claimant investigated the requirements to retain documentation, and took the view that she was unable to shred all the files because of the requirement to retain

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documentation and she told Mr Chapman this. The claimant did not shred all the files

55. Mr Chapman emailed the claimant on 9 December 2019 with two queries about clients. After the claimant provided her explanation, Mr Chapman  
5 emailed her on 11 December confirming instructions, and stating that ideally it was better to get things correct the first time, and asking the claimant to try to avoid errors in the future and suggested taking an extra moment to check things before submitting them (R20).
56. On one occasion the claimant booked an appointment for Mr Chapman with  
10 a prospective client in the city centre at 4 pm on a Friday afternoon which did not suit Mr Chapman, and he told her so.
57. The claimant did not take annual leave without permission. When the claimant took annual leave, she advised the respondents of her intended leave period. The claimant emailed the respondent in May 2019 (R 26) advising him that  
15 she was going on holiday and would be out of the office for a period in July, and marked this holiday tracker.
58. It was not the claimant's responsibility to look after debt collection.
59. While the claimant was employed the respondents did not measure time with timesheets. Part of the clients onboarding work with clients was to provide a  
20 'Quick Book' talk. This was not something which the client was charged for and was scheduled for one hour. The claimant endeavoured to keep this to 1 hour, but could not always do so. Mr Chapman never brought to the claimant's attention as an issue that she was giving away too much time within the business for free.
- 25 60. The client continued to provide services to Mr Thompson who owned a hairdressing's business. Prior to Mr Chapman acquiring the business Mr Thompson had instructed the respondents to deal with the day-to-day operation of his business to the extent of implementing payment his staff's wages and other bills. In order to do this, he had provided the respondents



with his bank account details. These details were provided to the claimant in her capacity as an employee respondent.

61. Mr Chapman was not keen to provide this type of service to clients, but took the view that Mr Thomson was a client of the business whom he had inherited, and therefore the respondents continued to provide this type of service to Mr Thompson.
62. At the end of November 2019, the claimant made a payment from Mr Thompson's account of £2,500 in respect of his rent. This payment was made in error into the bank account of Mr Thompson's old landlord, who were a company affiliated with his new landlord. As soon as she realised that she had made this error the claimant told Mr Chapman and Mr Thompson about it. She also contacted Mr Thompson's current landlord and explained the situation to them. She was told by them that the payment would either be rejected by the old landlord company, or sent on by them to the correct landlord. Mr Chapman did not meet with Mr Thomson to discuss this matter, which was resolved with the payment going into the correct account.
63. On 22 January the claimant emailed Mr McArthur (R38) with information about Mr Thompson's payroll. She attached a commission spreadsheet, and provided Mr McArthur with Mr Thompson's online banking details and advised him that payment was scheduled for 24 January. The claimant sent this email to Mr McArthur as she been asked to send over all information to him to allow him to undertake payroll work, and this information was necessary to process Mr Thompson's payroll work.
64. After the claimant had been dismissed, on the afternoon of Friday 24 January, she received text messages from RBS with access codes, which she realised were access codes for Mr Thompson's bank account. When she received these, she thought that the respondents must have been trying to pay Mr Thompson's staff wages and could not get access to his account.
65. The claimant therefore texted Mr Chapman with the security code for Mr Thompson's bank account (R35) which had been texted to her by RBS. The claimant had changed the mobile number for the RBS contact for Mr

Thompson's account to her personal mobile because she was making salary payments to his staff while she was working from home in December 2019, and she explained this to Mr Chapman in her text. She also explained that Mr Chapman would need to change this back to the business mobile and that this was done online on RBS.

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66. At some point after the claimant's dismissal Mr Chapman advised Ms Cassidy and Mr Thompson that the business no longer wished to act for them.

67. January is a particularly busy time for the respondents, and Mr Chapman had arranged with Mr McMillan to work in the business for a period in January in order to help out. Initially Mr McMillan agreed to this, however as the time approached when he was due to start work, he decided that he did not wish to do so as it went against his personal practice or rule of never returning to an employment which he left, and he advised Mr Chapman of this shortly before his engagement was due to commence. Mr McMillan had a sense that the claimant had a degree of unease about his returning to work in the business. She had told him that she would feel emotional about him returning to the office.

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68. The claimant has a very close personal relationship with her father, and felt that it would be emotional for her if her father were to return to work in the business. She had approached Mr Chapman and asked if she could work from home during the period where her father was at work because of this.

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69. The claimant did not appeal the decision to dismiss. She considered it unlikely that she would obtain a fair hearing at appeal, taking into account the manner in which her dismissal had been dealt with, and the fact that the right of appeal was to Mr Chapman.

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70. The claimant felt stress and anxiety as a result of her dismissal, and attended her GP on 3 February who issued her with a certificate of fitness for work, confirming she was unfit for the period from 31 January to 14 February 2020 (CL 101).

71. It was agreed that the claimant's salary from her employment with the respondents was £35,000 per annum.

72. The claimant was successful in obtaining alternative employment, and started to work with Robb Ferguson in the capacity of bookkeeper, on Monday, 17 February. The claimant's salary from that employment was £26,000 per month. The claimant was put on furlough on 1 April, and received 80% of pay, until the end of May, when she resumed work. The claimant's employment with Rob Ferguson came to an end on 16 October.

73. In her employment with the respondent the claimant was included in a pension scheme. She made employee pension contributions of 3%, and her employer pension contributions were 6.9% of her salary.

74. In her employment with Rob Ferguson, the claimant was also part of a pension scheme, under which the employee contributions were 3%, and the employer contributions of 5% of her salary.

#### **Note on Evidence**

75. There were significant conflicts in the evidence in this case. The Tribunal notes that Mr Chapman made submissions on the evidence, extracting particular phrases or answers, or parts of answers, given to questions which he submitted supported his position. Ms Davis also made extensive submissions on the evidence. While it is not necessary for the Tribunal in its assessment of the evidence to deal with every submission made by the parties about the evidence, the Tribunal had however to resolve material conflicts on a considerable number of points, and did so by considering the relevant evidence.

76. The Tribunal heard from a number of witnesses. Its overall impression was that Mr Chapman was neither credible nor reliable on a number of material points, which are dealt with below in more detail. Mr Chapman was on occasions evasive in answering questions, and the interpretation which he placed on events on some occasions was so unrealistic that it impacted adversely on the Tribunal's assessment of his credibility. An example of this

is that Mr Chapman sought to suggest that the claimant had lost £4,000 from a client's account. He accepted this related to an incident when the claimant paid rent due by Mr Thompson into his old landlord's account. The credible evidence of both the claimant and Mr Thompson was that she had paid  
5 around £2,500 into the incorrect account of a previous landlord who was affiliated in some way with the new landlord; that the claimant had immediately brought this to Mr Thompson's (and Mr Chapman's) attention, and that has been resolved. The fact that Mr Chapman presented this as the claimant losing £4,000 from a client's bank account, without more, demonstrated the  
10 degree to which he was prepared to exaggerate, embellish, and miscast events in order to support his position. In submission Mr Chapman suggested that Mr Thompson had agreed the money was lost. However, when Mr Chapman asked Mr Thompson in cross examination if he accepted £2,500 was lost, he responded; no- it was put into the original landlord's bank  
15 account.

77. The Tribunal also heard evidence from all of the respondent's current employees. The Tribunal did not form the impression that any of these witnesses deliberately sought to mislead, but it did form the impression that the evidence of Mr McArthur, Mr Cassidy and Mr McCafferty and was to a  
20 degree influenced by their not wishing to give evidence which may have been contrary to the interests of Mr Chapman.

78. All of these witnesses gave evidence about the events of the 21 January; Mr Lowe also gave evidence about telephone calls he had witnessed the claimant have with Ms Cassidy; and Mr McArthur gave evidence about the  
25 events after the claimant was absent from work and about certain operational issues. Where their evidence is relevant, the Tribunal has dealt with it below.

79. Mr Chapman asked all of these witnesses to comment on whether he had ever behaved aggressively towards the claimant, or anyone else, whether he had ever acted improperly towards the claimant or in a dismissive or  
30 inappropriate or condescending manner towards her, or if he had harassed, or demanded things from her. He also asked them if he had instructed them not to speak with the claimant.

80. All of the respondent's witnesses confirmed that they had never seen Mr Chapman behave in any of these ways towards the claimant, and they confirmed that they did not consider they worked with in a hostile environment. Indeed, their evidence was that they all considered their working environment was relaxed, and the Tribunal accepted this evidence. There was nothing to suggest that any of these witnesses considered their working environment to be any way difficult, and in fairness to the claimant she did not seek to suggest that the working environment generally was difficult, but rather her evidence was that she felt isolated, particularly by the beginning of January 2020. The Tribunal accepted the claimant's evidence on this. The fact that other members of staff considered they had a good working environment, did not mean that the claimant's perception of matters necessarily had to be the same as theirs.
81. In any event not a great deal turns on either the claimant's perception, or that of other members of staff as to the working environment in January 2020, or before that, taking into account the matters which the Tribunal has to consider in determining the claims before it. The claimant also gave evidence to the effect that Mr Chapman had made comments to her in the period after he took over the business, until her dismissal and she felt uncomfortable as a result of his comments and/or behaviours. It is however unnecessary for the Tribunal, in considering the issues before it arising from the claim of unfair dismissal and breach of contract, to make factual determinations as to what comments Mr Chapman did or did not make to the claimant in the period going back to August 2018.
82. The claimant gave evidence on her own behalf, and she impressed the Tribunal as being a credible and reliable witness. Her evidence was consistent and presented in a straightforward manner, and to the extent that contemporaneous evidence was available, was generally consistent with it. The claimant was also prepared to make reasonable concessions, for example accepting without difficulty that she considered she had behaved unprofessionally on the morning of 21 January. She also conceded that issues had been raised about the payroll work for Christina's. The fact that

the claimant was prepared to make appropriate concessions, enhanced her credibility in the Tribunal's view.

83. In his submissions, Mr Chapman attacked the credibility of the claimant on a number of bases; where relevant these are dealt with below. In addition to these points, Mr Chapman suggested that the claimant was lying because in her evidence was that she told Mr Chapman at the meeting of 24 January, that she was suffering from stress, but her ET one form says that she *'tried to explain that she had been suffering from stress'*.
84. Such a suggestion is in the Tribunal's view without merit. The statement that the claimant *tried to explain* that she was suffering from stress is consistent with her evidence, which was to the effect that she told Mr Chapman that she was suffering from stress, but he would not engage with her on this.
85. Mr Chapman made a similar point about the claimant's interaction with Mr McArthur, and the fact that the ET1 says that she 'assumed' the message he passed on, which is dealt with below. The Tribunal did not draw any adverse inference as the claimant's credibility from this.
86. Mr Chapman made two assertions as the claimant's credibility relating to her role. He relied on the fact that the ET1 stated the claimant was to longer to complete VAT returns, but her evidence was that she continued to complete VAT returns for two clients.
87. The claimant's evidence was that she was told to pass over VAT returns to Mr Lowe, but retained two clients, and this did not appear to the Tribunal to be a major inconsistency between the claimant's evidence and the ET1, giving rise to an inference adverse to her credibility.
88. Mr Chapman submitted that the claimant accepted that R17 was a fair assessment of her role, but earlier in her testimony she claimed that Mr Chapman did not understand her role, and he submitted that she was not telling the truth. The Claimant gave evidence to the effect that she met with Mr Chapman and explained her role, and that R17 was produced. She remained of the view that Mr Chapman did not understand her role, and there

was nothing in the Tribunal's view which was inconsistent in the claimant's position about this, and the production at R17, which impacted adversely on the credibility of her evidence.

5 89. Mr Gordon McMillan give evidence as to when he set up McMillan's accountants, the claimant's employment with him transferring to the respondents, the negotiations would took place when Mr Chapman acquired the business, and the reasons why he decided not to provide consultancy services to the respondents in January 2020. There was no significant challenge to Mr Macmillan's evidence other than a challenge as to why he  
10 decided not to work with respondents in January 2020. Mr Macmillan explained that he as a personal rule he never went back to work somewhere where he had left, and he communicated this to Mr Chapman, and it was for that reason he decided not to return.

15 90. Overall, the Tribunal found Mr Macmillan to be a credible and reliable witness, and accepted his evidence, and on balance the Tribunal was prepared to accept that Mr Macmillan did not return to the business for the reasons he gave.

20 91. The Tribunal heard from Ms Anne Marie Cassidy and Mr Thomson. They both gave evidence as to interactions with their claimant and respondent on matters which formed part of the reasons for the claimant's dismissal. Any issues of reliability in relation to their evidence was in the Tribunal's view, explained by the passage of time, and it formed the view that both of these witnesses were credible. Albeit Mr Chapman had decided to no longer act for either of these clients, neither presented with any agenda other than to  
25 present their evidence as truthfully as they could.

92. Given the extent to which there is a dispute on the facts the Tribunal has endeavoured to deal with each relevant conflict separately.

#### **Length of the claimant's employment**

30 93. There was no acceptance by Mr Chapman as to the length of the claimant's employment. As referred to above, the Tribunal accepted Mr McMillan's

evidence, confirmed by the claimant, to the effect that she commenced employment with her father when he operated as a sole practitioner in September 2010, and that her employment transferred to the respondents when that company which was incorporated in May 2014.

5 **Events of 21 January 2019**

94. Although there was contested evidence as to what occurred on 21 January, there was also a considerable amount which was not in dispute. The Tribunal formed the impression that there was a degree of exaggeration or embellishment in the evidence of Mr MacArthur, Mr Cassidy and Mr  
10 McCafferty about the events of the 21 January. They all voiced an opinion, in line with Mr Chapman's opinion, that the claimant was under the influence of drink or drugs, and the Tribunal formed the impression that in giving their evidence they sought generally to lend support to Mr Chapman's position. Notwithstanding that, the general flavour of the evidence was that there was  
15 a workplace incident, which occurred over in a very short period of time, during which the claimant behaved in a way which was out of character for her, raised her voice and responded to Mr Chapman in a manner which was unprofessional or disrespectful, and after that she left the office, having been told to do so by Mr Chapman.

20 95. Mr Chapman's evidence was that the claimant arrived late into the office and then proceeded to sing and hum for 20 minutes while making tea and coffee, and after that she finally sat at her desk. He said that he approached her and asked if she could send over file. She responded in an aggressive tone and snapped at him that she had already sent to him Mr Chapman politely  
25 expressed that while she had sent a file it was not the one he was referring to, and he asked if she would send on the file which related to director's income tax returns. He said the claimant then rolled her eyes shook her head and became very expressive with her arms and said in a very sarcastic manner said the following 'ooooooooo is that the file you want. I didn't realise I'm  
30 sooooooooo stupid I can't ever do anything right.' He said that he then paused to assess the situation and determined that the claimant was acting out of character and something was wrong. He asked if she was okay, and her



response was very negative. He said that she aggressively stated it was none of his business and she wanted him to leave her alone and then demanded that he left her workspace. He asked the claimant again if everything was okay, and said to her that he believed that something was not okay, and she was not acting in a professional manner and in a very peculiar manner. The claimant responded to in a very aggressive manner and said '*how dare you speak to me like that. I'm a 36-year-old woman and I would be spoken to in this way.*' Mr Chapman said he then determined that something was seriously not right and considering the facts he determined that the claimant was either drunk or on drugs. Realising this he immediately and told her that they would discuss the situation the following day as part of the disciplinary process. At first claimant refused to go home, however he could not present her to clients in her current state and therefore insisted that she went home. He said as she left, he had several muttered negative comments.

96. The claimant's evidence was when she came into work, she was feeling stressed and anxious. She did not expect the other staff member to acknowledge is that had not been happening since 6 January. She met Mr Chapman in the kitchen, but they did not speak. Shortly after she went to her desk and came over her and ask if she had a spreadsheet of the directors' tax returns. She said yes, but then realised it he was asking for a different spreadsheet said that she would get it to him. He was not happy with the situation. He asked her if she was okay, and she said yes. He then asked her if there was something wrong. Her evidence was that she formed the impression he wanted to discuss matters in the open office and that he was looking at other members of staff she felt uncomfortable. The claimant felt that he was goading her. The Claimant accepted that she had made the comment attributed to her about being a 36-year-old woman et cetera, but she did not accept that she had said '*how dare you,*' or the other comments attributed to her by Mr Chapman. She accepted that she had muttered to herself as she left, she accepted that she had raised her voice to Mr Chapman.

97. What occurred on the 21<sup>st</sup> was spoken to by all the respondent's witnesses in general terms. All of the respondent's witnesses voiced the opinion that the claimant was behaving in a way which was out of character. None of the witnesses were able to give evidence as to exactly what was said by either  
5 Mr Chapman or the claimant, but they all confirmed that the claimant had responded to Mr Chapman, in a manner which they considered inappropriate. Mr Lowe described it as a workplace argument which was over in a few moments, and said the claimant had raised his voice after Mr Chapman asked for a file. Mr Cassidy said that the claimant responded aggressively to Mr  
10 Chapman, and that she was shouting. Mr McCafferty said the claimant shouted, and that the claimant acted aggressively and then stormed out; Mr McArthur said the claimant was heated, he said that she yelled, and he described her behaviour as cheeky. None of the witnesses spoke to having seen any conduct on the part of Mr Chapman which would have provoked  
15 such a response from the claimant.
98. The Tribunal did not conclude that Mr Chapman set out to deliberately goad the claimant or that he behaved aggressively towards her. It did, however, accept that the claimant felt she was put on the spot, that she was anxious and stressed, as she said in her evidence. The Tribunal concluded that the  
20 claimant had responded to a question from Mr Chapman with the comment about being a 36-year-old woman who would not be spoken to like that and had raised her voice in doing so.
99. The Tribunal was satisfied that the claimant's behaving in this way was out of character for her. This was the evidence of all the respondent's witnesses,  
25 and such a conclusion is supported by the fact that the claimant emailed Mr Chapman the following day recognising that she behaved unprofessionally, and volunteering that there was no excuse for this.
100. Given its general impression of the claimant's credibility as against that of Mr Chapman, the Tribunal did not find that she had made the other comments  
30 attributed to her, and the Tribunal concluded there was that there was a short workplace incident in which the claimant responded inappropriately to Mr Chapman in a raised voice.

101. The Tribunal did not conclude that the claimant was drunk or on illicit drugs when she came into the office on 24 January.

102. Mr Chapman sought to suggest that the fact that the claimant's Facebook profile picture was a photograph of her with a glass of alcohol in her hand undermined her position that she did not drink much, and it seemed to be suggested that this might support the conclusion that the claimant attended work drunk. If that is the submission, then it is without merit.

103. The opinion that the claimant was drunk or on drugs was given by Mr McArthur, Mr McCafferty, and Mr Cassidy as well as Mr Chapman. This was entirely a matter of their opinion which appears to have been formed on the basis that the claimant behaved in a manner which was out of character. None of the witnesses gave evidence to the effect that the claimant smelt of alcohol, or slurred her words. Mr McCafferty and Mr McArthur gave evidence which was to a degree inconsistent as to what they observed in the claimant on the morning of the 21<sup>st</sup>. Mr McArthur said he thought the claimant was strangely bouncy; Mr McCafferty said her manner was lackadaisical. Such differences of opinion as to how the claimant was acting underpin the fact that they are simply expressions of opinion, and the Tribunal did not attach any significant weight to that opinion, in the face of the claimant's credible denial that although taking anti-depressant medication, she was not under the influence of illicit drugs or alcohol on the morning of 24 January.

104. In reaching its conclusion the Tribunal did not consider much was to be drawn from the fact that the claimant was humming or singing when she went into the office. The claimant accepted that she was doing this, but explained that in her view was likely to be a defence mechanism because of how anxious she felt, and the Tribunal considered this explanation had a ring of truth about it.

### **Notice of Disciplinary Proceedings**

105. The Tribunal did not conclude that Mr Chapman, as he claimed, told the claimant on 21 January that he would discuss the situation with her the following day as part of her disciplinary proceedings. His doing so is

inconsistent with the terms of his email to the claimant on 22 January, the terms of which set out in the findings in fact and which make no mention of disciplinary action.

5 106. Mr Chapman's evidence was that he spoke with the claimant on 22 January regarding passing work over to Mr McArthur. He said that the claimant told him she would be back in the office the following day, and he told her that upon her return he would be holding a disciplinary hearing.

10 107. The claimant's evidence was that no such conversation about a disciplinary hearing took place, and on balance the Tribunal accepted this. In reaching this conclusion the Tribunal takes into account that it lacked plausibility for Mr Chapman on the one hand to email the claimant in the terms of which he did on 22 January, where he failed to make any mention of a disciplinary hearing, but to say that on the same day he spoke to her advising her that she would be called into a disciplinary hearing on her return to work.

15 108. The Tribunal accepted the claimant's evidence that she was unaware that she was going to be subjected to disciplinary action, until she returned to work on 24 January.

**Claimant's contact with the respondents on 23 January and existence of  
Absence Management reporting policy.**

20 109. There was a significant conflict as to whether the claimant contacted the respondents on 23 January to advise that she would not be coming into work. The claimant's evidence is as set out in the Findings in Fact on this point.

25 110. Mr Chapman's position was that there was no contact at all from the claimant. He said that she did not come into the office, and did not telephone or email to explain her non-attendance. Mr Chapman also said that he had spoken to Mr McArthur on the afternoon of 23 January and asked him if there had been any contact from the claimant and that Mr McArthur told him that there had been no contact from the claimant.

30 111. Mr McArthur in cross examination accepted that he had spoken to the claimant on a couple of occasions. He said he could not be certain of the

dates. He was directed to the respondent's production at R 29 which appears to be an email of 23 January asking for password information, and he accepted that it could have been 23 January when he spoke to the claimant.

5 112. Mr McArthur also accepted in cross examination that during the course of a telephone call with the claimant she told him that she continued to be unwell. He accepted that she said something to the effect that she was hoping to be back to work the next week. Mr McArthur said he could not recall if the claimant asked him to pass the message on to Mr Chapman. His evidence was that he could not say for sure that he had told Mr Chapman, but he  
10 accepted that it would be unusual that he did not pass such a message on.

113. It was put to Mr McArthur in cross examination that Mr Chapman's evidence was that he had spoken to Mr McArthur on 23 January and he told Mr Chapman that he had not spoken to the claimant. Mr Chapman said he could not recall this. He said he did not know about the dates.

15 114. On re-examination, Mr McArthur sought somewhat to depart from this position. He was asked whether later on the Thursday (23 January) he had told Mr Chapman that he had not spoken to the claimant, to which he responded he did not know.

20 115. On balance the Tribunal was satisfied that that was the date when Mr McArthur spoke to the claimant was 23 January. His doing so was consistent with the terms and date of his email to her. Furthermore, the claimant had contacted the respondents 22 January, and she attended work of 24. This renders it more likely that the claimant told Mr McArthur on the 23 January that she continued to feel unwell and was unable to attend work, as she had  
25 contact with the respondents on the other dates.

30 116. In reaching its conclusions the Tribunal also take into account that when it was initially put to Mr McArthur in cross examination that he had spoken to Mr Chapman on 23 January and told him that he had had no contact from the claimant, his evidence clearly was that he could not recall this. Even though he added that he did not know about dates, the Tribunal formed the impression that this was correct, and on balance it was not satisfied that Mr

McArthur had told Mr Chapman on 23 January that the claimant had not been in touch. Rather, the Tribunal was satisfied that the claimant had been in touch with Mr McArthur as she said, and had asked him to pass on information to Mr Chapman to the effect that she remained unwell and would not be coming into work.

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117. The Tribunal also took into account the terms of ET 1, which states that *‘Mr McArthur sits next to Mr Chapman in the office and the claimant advised Mr McArthur that she remained unwell and would not be in but expected to be back on Monday. There is no absence reporting policy in existence and no specific requirement had been communicated to the claimant in respect of absence management reporting. The claimant assumed that Mr McArthur would be perfectly able to pass this information onto Mr Chapman’*.

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118. Mr Chapman submitted that claimant’s position in evidence was the opposite of that set out in the ET1. The ET1 states the claimant assumed Mr McArthur would pass the information on, but she said in evidence she had asked him to. Mr Chapman’s point was that this established the claimant was lying. The Tribunal was not persuaded that was the case. While the ET1 does not state in terms that the claimant asked Mr Chapman to pass the information on, it cannot be read as precluding the possibility that she did so, and the Tribunal was not persuaded that a great deal turned on the fact that the ET1 said the claimant assumed that Mr McArthur was capable of passing the information on.

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119. The Tribunal was also satisfied that Mr McArthur did pass the information on to Mr Chapman. In reaching this conclusion the Tribunal also takes into account that Mr McArthur’s evidence on cross-examination suggested a degree of uncertainty as to whether he had passed information onto Mr Chapman, however the Tribunal considered it unlikely that Mr McArthur, who was covering the claimant’s work during what was a busy period, having been told by the claimant that she would not be at work that day and that it was unlikely that she would return to work until the following week, would not have passed that information onto Mr Chapman, and on balance the Tribunal was

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satisfied that he did so. Indeed, Mr McArthur accepted in cross examination that it would have been unusual if he had not passed it on.

120. There is also an issue in relation to the existence of an absence reporting policy. It was Mr Chapman's position that there was a policy in force, which the claimant breached, and he referred the Tribunal to a document at R5. Under the logo of Tax Assist Accountants, this document provides 3 steps for absence reporting, one of which provides that; *'You must contact the Office manager at the earliest possible time but no later than one hour before the start of your shift. This must be done on each day of absence.'*
- 10 121. It was Mr Chapman's position that the claimant was in breach of this policy, and this formed one of the reasons why she was dismissed.
122. It was the claimant's position that she had never seen this absence management policy, and the Tribunal preferred her evidence on this point. There was no documentary evidence to support the conclusion that the claimant or any of the respondent's employees had been made aware of this policy provision.
- 15 123. There was no evidence before the Tribunal upon which to conclude that the claimant's absences on the 23 January caused major operational issues and that many clients complained and stopped using the respondent's services as a result, which was a submission made by Mr Chapman. Mr MacArthur's comment in evidence which Mr Chapman referred to in support of this was to the effect that no one else had payroll knowledge and that he was unsure how many clients left as a direct result of this but that he estimated that the level of recurring loss would be between 7-10k. Absent any kind of detail, or explanation of a causative link this was incapable supporting the conclusion that the claimant's absence on the 23 of January caused the respondents major client loss
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#### **Disciplinary Investigations/Meeting of 24 January**

124. Mr Chapman's evidence was that following the incident on 21 January he conducted a full investigation, and that this investigation took place over three
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days. His evidence in chief was that he interviewed all the staff to learn what they had seen and to understand their view the situation, and he interviewed the cleaner who had heard everything.

5 125. It was the evidence of all of the respondent's witnesses that at some point they had some sort of discussion with Mr Chapman about the events of 21 January and the Tribunal was satisfied that he had spoken with the other employees and with the cleaner.

10 126. Mr Chapman also said that he also reviewed his notes in the claimant's file to consider all of her actions as he had been keeping track of her behaviour for a period of time. Mr Chapman produced for the Tribunal a document at R 34, which is 59 lines long, each line identifying what Mr Chapman said was an issue in terms of the claimant's conduct or performance. The Tribunal could make no factual conclusions as to how or when this document was compiled by Mr Chapman.

15 127. It was Mr Chapman's evidence that the claimant was aware that they were going to discuss the matters upon her return to the office and that she had three days out of the office and ample time to consider an explanation of the events that occurred. Mr Chapman's evidence was that the claimant was invited into his office when she returned on 24 January and he advised her  
20 that he conducted a full investigation into the events of Tuesday 21 January and several other factors as well. He told that as part of the investigation he had spoken with five different individuals and reviewed a document that he had been keeping which detailed her actions over the previous several months (R34). Mr Chapman said the document was with him in the meeting,  
25 and the claimant was aware of the issues in the document. He said that he told the claimant that having considered all the information at his disposal he considered her actions were gross misconduct. He gave the claimant the opportunity to explain her actions in relation to events of 21 January and that he gave her the opportunity to explain several of the other issues, but she  
30 chose not to provide any explanation. Mr Chapman said that considering no explanation was provided and no conversation was taking place, he told her that he had no choice but to terminate her contract of employment. He told



her she would have a chance to appeal, and that he would provide her with a letter detailing full details of his reasoning and that any appeal should be made in writing to him. He said that he asked if she had any questions; the claimant said nothing. He gave her several more minutes to discuss anything she wanted, and she said nothing. Mr Chapman's evidence was that she could see the claimant was upset so he offered to leave the room so that she could have some time to herself and that he advised that she could take as long as she needed in the room, and when she came out they could chat further if she wanted to discuss anything further. He said that after approximately 10 minutes the claimant came out of the office, collected her things and left.

128. There was a degree conflict between the evidence of the claimant and Mr Chapman as to what happened at the meeting of 24 January. The most significant element of this is whether the claimant had any notice at all of the issues to be discussed including the issues in R34 which Mr Chapman said he had with him at the meeting, or had any chance to comment on them or anything else.

129. The claimant's version of events is as set out in the findings of fact.

130. In preferring the claimant's version to that of Mr Chapman, the Tribunal took into account that Mr Chapman was evasive in answering questions about whether he passed over the document at R34 to the claimant in the course of the meeting. His position seemed to be that the document was in the meeting and the claimant was aware of it rather than that she had been given a copy of it.

131. Even taking into account that Mr Chapman is not legally qualified, to suggest that the claimant would be in a position to make a meaningful contribution to a discussion in a disciplinary context of matters about which she had not been advised of either in advance of the meeting or in the course of the meeting, were the subject of disciplinary, is simply not tenable. The fact that Mr Chapman was prepared to advance this position adversely impacted upon his credibility, including his credibility as to what occurred at the meeting in the

Tribunal's view, and the Tribunal preferred the claimant's version of what occurred.

**Reason for dismissal in letter of 25 January, in addition to the events of 21 January**

5 **Two verbal warnings**

131. It was the claimant's evidence that she had never received any verbal warnings from Mr Chapman.

132. Mr Chapman's evidence was that he had given the claimant two verbal warnings; one in October 2019, and one in November 2019.

10 133. He said on both occasions the claimant accepted that she had acted in a poor manner and apologised. It was his evidence that he had given the claimant a verbal warning each time, and told her she must conduct herself in a professional manner that she must not speak to him again in that way.

15 134. Mr Chapman's evidence was that in October 2019 the claimant has spoken to client in an inappropriate manner. A client raised an issue that the claimant made several mistakes. The attitude the claimant showed towards the client was appalling and that she told the client that she was prone to making mistakes, and the client should check her work. Mr Chapman said the claimant also told the client the mistake was their fault as they had not  
20 checked her work. He said that he raised this issue with the claimant, and her attitude was very poor. She was extremely sarcastic, and her attitude was that of an angry teenager. He gave a verbal warning and told her she needed to improve the professionalism. He also told that he would be monitoring her attitude going forward. The following day the claimant came to apologise for  
25 her behaviour and accepted that she had acted appropriately. He said the claimant told him that she 'gets funny at certain times of the month'.

135. It emerged in cross examination that the client to whom Mr Chapman referred in his evidence about the October verbal warning was Ms Cassidy.

136. The claimant denied ever having received any type of verbal warning from Mr Chapman. She did not accept that conversations of the type described in Mr Chapman's evidence took place. She accepted that they had a discussion about issues arising from difficulties with the work she carried out for Ms Cassidy. The claimant accepted that she had told Ms Cassidy that she should check payroll information when it was sent out to her, and she understood that Ms Cassidy has spoken to Mr Chapman about issues she had with the payroll work .
137. The claimant denied that she told Ms Cassidy she was prone to making mistakes, saying she would never say such a thing to a client.
138. On cross examination it was put to Mr Chapman that Ms Cassidy had never complained about the claimant speaking to her unprofessionally. Mr Chapman was evasive in answering questions about this. He said that Ms Cassidy had complained generally about errors made. When asked 'did she complain about how the claimant spoke to her?', Mr Chapman responded that she complained about poor performance. When asked had Ms Cassidy complained about the way the claimant spoke unprofessionally, Mr Chapman said he could not recall the specific words but the general information he took was that the claimant spoke inappropriately, and that Ms Cassidy was not happy. Pressed again on this point, he said that involved everything that took place in that conversation; and asked for the last time, his evidence was that he would not give a yes or no answer to the question of whether Ms Cassidy had complained that the claimant has spoken unprofessionally to her.
139. Ms Cassidy's evidence was that she had not made any complaint to Mr Chapman to the effect that the claimant has spoken unprofessionally to her. She felt she had a good relationship with the claimant. Her evidence was that she had spoken to Mr Chapman and felt the claimant was struggling, and that Mr Chapman assured her that her business could be conducted if the claimant was there or not, but that it had not worked out that way. She said that she had raised concerns about Fiona as she felt that she needed support. She said she raised concerns about Fiona, for Fiona.

140. In light of this evidence, the Tribunal did not conclude that Ms Cassidy had complained about the claimant acting unprofessionally. It accepted the claimant's version of events, and while the Tribunal found that there had been discussions between the claimant and Mr Chapman about issues with Christina's pay roll work, it was satisfied these did not take place in a disciplinary or performance review context, and the Tribunal did not conclude that a conversation such as described by Mr Chapman in his evidence had taken place in October 2019, or that the claimant had received a verbal warning in October 2019.
141. Mr Chapman also said that he gave the claimant a verbal warning in November 2019. His evidence was to the effect that the claimant spoke to him inappropriately, mocking what he was saying. He said she apologised the following day and that he told her he was giving her another verbal warning, and that she needed to improve.
142. None of this was gone through in any detail with the claimant in cross examination, and her position evidence in chief was that she was not given a verbal warning in November 2019, or at any other time. Taking into account its general impression of credibility, which are supported by its findings as to Mr Chapman's evidence about the warning he alleged he had given the claimant in October 2019, the Tribunal accepted the claimant's evidence, and did not conclude that she been given a verbal warning in November 2019.
143. The Tribunal is also supported to a degree in its conclusions as to the claimant's behaviour and attitude in October and November 2019, in that Mr Chapman, (and a number of his witnesses), characterised the claimant's behaviour on the 21 of January, which included answering back in a raised voice, as being out of character. Had the claimant demonstrated the attitude and behaviours of which she was accused by Mr Chapman in October and November, then it appeared to the Tribunal to be unlikely that her behaviour in January would have been seen by Mr Chapman in this light.

144. Furthermore, Mr Chapman in a written document (R3) he referred to in giving his evidence, indicated that there were witnesses to these warnings, but on cross examination he confirmed that there were no witnesses.

### **Cancelling an organised outsource resource**

5 145. This referred to an allegation that the claimant had cancelled the services of Mr Macmillan who had agreed to work with the with respondents over a busy period in January.

146. The claimant's denied having done this. Her credible evidence was that she did feel emotional at the prospect of working again with her father, with whom  
10 she has close relationship. She approached Mr Chapman to explain this, and asked if she could work from home while her father was working in the business.

147. Mr Macmillan's evidence was not that his services have been cancelled by his daughter, but rather that he had decided to revert to his lifelong rule of not  
15 returning to a previous workplace. He accepted that he had a sense that his daughter felt emotional about his return and that she had spoken to him about this in passing.

148. The claimant accepted that she may have spoken to her father about finding it emotional for him to be in the office. That however does not amount to the  
20 claimant cancelling Mr Macmillan's contract for services, and the Tribunal did not conclude that she had done so. The reason why Mr Macmillan decided not to undertake work for the respondents in January is in some senses irrelevant, albeit the Tribunal accepted his evidence on this point. What is  
25 relevant is whether the claimant without the respondent's authority cancelled his contract for services, and the Tribunal was not satisfied that she had done so.

### **Passing on our client's confidential banking information**

149. This relates to an allegation that the claimant passed on what was said to be confidential banking details for Mr Thompson.

150. It was Mr Chapman's evidence that he had inherited Mr Thompson as a client. The arrangement in place were that the respondents would operationally implement payment of his staff, which required them to have his banking details and be able to access his bank account. This was work which Mr Chapman was not keen the respondents did, but it was retained as Mr Thompson was an existing client
151. It was Mr Chapman's evidence that when he discovered that the claimant had Mr Thompson's banking details, he told her that this was confidential information and should never be shared with anyone else, including Mr Chapman, without the express permission of the client.
152. There was no issue that Mr Thompson had provided the respondents with his bank details so they could have access to his bank account in order to pay staff salary, and that the claimant had access to these. The claimant denied any conversation of the type alleged by Mr Chapman having taken place and there was no persuasive evidence from Mr Chapman as to when or how the conversation took place. While the Tribunal was satisfied that Mr Chapman may not have been keen on performing this type of work for a client, it did not conclude that he had had a conversation with the claimant as he described.
153. There is no issue that the claimant sent Mr Thompson's bank details to Mr McArthur.
154. In his evidence Mr Chapman said that the claimant doing this caused him several legal and professional issues which he needed to resolve with the client. When pressed in cross examination Mr Chapman could give no convincing detail as to what those issues were. Mr Thompson did not speak to Mr Chapman about legal or professional issues a consequence of the claimant passing on his bank details to Mr MacArthur, and the Tribunal concluded that this assertion on the part of Mr Chapman had no substance whatsoever.

**Actions preventing client from accessing his bank account**

155. This allegation again related to Mr Thompson. It was Mr Chapman's evidence that the claimant took steps that prevented Mr Thompson from accessing his own bank account and that this caused major issues with the client.
- 5 156. The findings in fact in relation to this point are set out above, and reflect the claimant and Mr Thompson's evidence on this matter.
157. What is relevant here is whether the claimant had, as alleged by Mr Chapman, taken steps that prevented the claimant from accessing his own bank account
158. The Tribunal was satisfied that the claimant received access codes from RBS onto her personal mobile for Mr Thompson's bank account because of the  
10 working arrangements which were in place between Mr Thompson and the respondents. As a result of the claimant having been dismissed she was not dealing with Mr Thompson's payroll work on the afternoon of 24 January, that may well have created an operational issue for the respondents, and the  
15 difficulties for Mr Thompson and his staff if they did not receive payment of their wages.
159. The text messages which Mr Chapman referred to at R 35 did not support the conclusion that the claimant had taken steps which prevented Mr Thompson from accessing his bank account. If anything, it suggested that she was trying  
20 to assist the respondents after she had been dismissed.
160. While the Tribunal concluded that the respondents may have difficulty accessing Mr Thompson's bank account on 24 January, which may have resulted in problems in paying Mr Thomson's staff, it was not satisfied that this was because the claimant had taken steps which prevented Mr  
25 Thompson from accessing his bank account.

**Excessive and deliberate poor performance**

161. A number of bullet points were included under this heading in the letter of dismissal.

162. The first was that the claimant had been talking unprofessionally to a client after making mistakes and telling the client she was prone to making mistakes and should be checking her work. This allegation related to the claimant's interaction with Ms Cassidy, which is dealt with above, and for the reasons already given the Tribunal was not satisfied that the claimant had spoken unprofessionally to Ms Cassidy. In reaching his conclusion the Tribunal also take into account the evidence of Mr Lowe. He was asked by Mr Chapman in evidence in chief if he had witnessed the claimant speaking negatively to a client. He said that maybe a couple of occasions she came off the phone frustrated, not agreeing with clients and thinking they were too demanding or asking too much of the respondents. He was then asked if he could think when the claimant has spoken inappropriately to clients, he said that this was the same as the last point; sometimes the claimant felt a bit 'under the cosh'. He said a couple of times she bit back, but then rained it in. The Tribunal was not satisfied that this evidence supported the conclusion that the claimant expressed any more than frustration on a small number of occasions when speaking to clients and did not conclude that it supported Mr Chapman's assertion that the claimant spoke unprofessionally to clients.
163. The second bullet point was that the claimant did not process the December payroll thereby leaving the client's staff without pay for the period when the claimant was on holiday. This allegation again related to work done for Ms Cassidy. Both the claimant and Ms Cassidy confirmed that as a matter of practice Ms Cassidy did not want her staff paid for the full month of December. Ms Cassidy explained she was concerned about the effect this might have on absenteeism in the later part of the month.
164. Both confirmed that it had been agreed that the claimant would arrange for payroll to be completed for the first three weeks in December, with an adjustment thereafter being made in January.
165. The Tribunal was satisfied that the protocol which Mr Chapman had put in place for the performance of Ms Cassidy's work had been altered for the month of December because of this practice, at the request of Ms Cassidy. It was also satisfied on balance that the discussion about the alteration took



place between the claimant and Ms Cassidy, as opposed to Ms Cassidy and Mr Chapman. The fact that was the case did not support the conclusion that the claimant had not processed pay for Christina's staff, leaving them without pay, for the period when she was on holiday over Christmas.

5 166. The Tribunal was satisfied that the claimant had implemented the payroll for  
December in accordance with the client's instructions, albeit this may have  
represented a departure from the protocol produced by Mr Chapman. While  
Mr McArthur gave evidence about Ms Cassidy being unhappy, which is  
referred to by Mr Chapman in his submissions, he was unable to attribute this  
10 to the claimant having not processed the payroll for her staff, leaving them  
without pay for the period when she was on holiday. His evidence was that  
Ms Cassidy sounded irate when he spoke to her on the 21 January and that  
it was hard to tell if that was because it was now 'us' doing the payroll and not  
Fiona, or a mix. Mr MacArthur said that Ms Cassidy was not pleasant on the  
15 phone and that she raised her voice and had a bullying manner. He described  
her generally as not a pleasant customer, and his evidence on this is not  
inconsistent with the claimant's evidence to the effect that Ms Cassidy could  
on occasion be difficult.

20 167. The next bullet point is *misplacing approximately £4,000 of a clients' money  
from their bank account.*

168. Mr Chapman's evidence was that the claimant had lost £4,000 from a client's  
account. Mr Chapman accepted this related to an incident when the claimant  
had paid rent due by Mr Thompson into an old landlord's account.

25 169. The credible evidence of both the claimant and Mr Thompson, was that she  
had paid around £2,500 into the incorrect account of an old landlord; that the  
claimant had immediately brought this to Mr Thompson's attention (and Mr  
Chapman's attention) and it had been resolved. That did not amount to the  
claimant losing £4,000 from a client's bank account, which was part of the  
reason for her dismissal.

30 170. Mr Chapman did not discuss this matter with Mr Thompson.

171. The next point was '*continually giving away your time for free, despite being told not to.*'
172. The claimant explained that as part of the client 'on boarding' process required her to provide some free training; that it was not always possible to complete this within the one hour set aside for it, but that she was always mindful time. There was no evidence beyond Mr Chapman's assertion, which the Tribunal found neither credible nor reliable, to support the conclusion that the claimant continually gave her time away for free, despite being told not to.
173. In addition to the bullet points identified in the letter of dismissal, the letter also identified that Mr Chapman had been keeping a track record of the claimant's performance for a long time.
174. A 59 line document is produced at R34 which is headed '*Work review and investigation*'.
175. The Tribunal did not hear evidence about every matter identified in this document, but a number of the matters identified in it were dealt with in the letter of dismissal.
176. The matters which the Tribunal heard evidence about, and which were not specifically addressed in the letter of dismissal and upon which there was a conflict in fact were as follows.
177. *The claimant took holidays without permission.* The claimant denied that this was the case. In support of his position that the claimant took leave without permission, Mr Chapman produced R26, an email in which the claimant advises that she is going to take leave in July. There was no evidence to support the conclusion that the claimant was told she could not have this leave, but went ahead and took it, which would be necessary to support the conclusion that the claimant took leave without permission, and the Tribunal did not conclude that she did so.
178. *Clients left because of the claimant's mistakes causing a loss of 4K recurring annual business.* - There was no evidence to support this. There was no evidence of any clients having left the business because of mistakes made by

the claimant. Two clients for whom the claimant did act, Ms Cassidy, and Mr Thompson, were told by Mr Chapman after the claimant was dismissed, that the respondents no longer wished to act for them.

5 179. *Debtors value and number of outstanding amounts.* The value of 15K worth of outstanding debtors which had not been reduced in a long time. The claimant gave unchallenged evidence that she was not responsible for debt collection, which the Tribunal accepted.

10 180. *Various issues with onboarding work.* The claimant accepted that part of her responsibility was onboarding new clients, which involved dealing with compliance issues. The claimant accepted that Mr Chapman on occasion spoke to her about the number of clients whose details for onboarding remained outstanding on a spreadsheet. The Tribunal accepted that the claimant explained to Mr Chapman that this was because she required compliance information which was not always readily forthcoming. The  
15 Tribunal accepted that Mr Chapman had asked the claimant to remove these clients from the spreadsheet, and she told him that he could not do this. This however was because of the need to obtain the compliance information. There was no credible evidence to establish that the onboarding work was massively behind schedule, or that many clients had missing or incorrect data  
20 on the database or that the services provided to clients were not detailed on the client database or that details were historical, and that these matters where the responsibility or fault of the claimant, all as asserted in the document at R 34.

25 181. *Failure to shred files.* The claimant accepted she was asked by Mr Chapman to shred files and that time was put aside for this. The Tribunal accepted her explanation, that having investigated the requirements to retain documentation she took the view that she was unable to shred all the files because of the requirement to retain documentation and she told Mr Chapman this.

30 182. *Poor management of Mr Chapman's diary.* There was evidence that on one occasion the claimant booked an appointment for Mr Chapman with a

prospective client in the city centre at 4 pm on a Friday afternoon which did not suit Mr Chapman, and he told her so. This single incident did not support a conclusion that there was poor management of Mr Chapman's diary.

183. Mr Chapman's overarching position was that the claimant, who had been a competent worker, began over a period to deliberately make mistakes in order to force the respondents to give her a financial settlement to leave, and that she did so conscious that her contract provided for a 12 month notice period. This, he submitted was supported by the speed with which the claimant obtained alternative employment. He submitted it was uncommon to obtain employment so quickly in the industry.

184. In support of his position Mr Chapman relied on the claimant having been in the business for nine years and that she felt she was a competent individual. He submitted that when she was asked in cross examination 'The number of your mistakes increased over time. Didn't they? She had replied '*there were some errors*'.

185. Mr Chapman however did not quote the claimant's full answer to that question in his submissions. The claimant's answer in full was; '*there were some more errors, but mostly to do with Christina's Home Care; but that was because you had changed the process and it would not work because of the nature of the business. It became clear it was not working resulting in a lot of errors. I was exceedingly concerned about and tried to explain to you.*'

186. Mr Chapman then asked if she accepted the severity of the issues increase rapidly over time, the claimant responded no, only with Christina's, and she thought that was a problem.

187. The claimant's evidence therefore did not support Mr Chapman's submission to the effect that she acknowledged or recognised there had been an increase in errors, and an increase in the severity of errors in her work.

188. Mr Chapman also submitted when asked about the severity of the issues on the log at R34 she accepted that "*some were severe.*" In fact, what the claimant was asked was '*How do you explain the severity of the issues?*'. She

responded, '*some of the issues where severe*'. That answer is not an acceptance of anything, and is nothing more than a comment on what is written in the log. The claimant went on to deny that the number and severity of errors increased over time and that she was acting deliberately, and wanted a payoff.

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189. The Tribunal did not conclude that claimant deliberately made mistakes, or acted in a way calculated to force the respondents into making her a financial offer to leave the business. While on occasions and there may have been errors in her work, (such as those referred to in the respondent's email of 11<sup>th</sup> December (R20)), the Tribunal was not satisfied that such errors or difficulties were anything beyond the product the of day to day work which the claimant carried out, and did not conclude they were part of a deliberate course of action on her part.

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190. Nor did the Tribunal conclude that the claimant had been subject to any sort of ongoing performance review in connection with her work. Mr Chapman asked the Tribunal to draw an inference adverse to the claimant's credibility on the basis that she said that she had not seen R34 before the Tribunal, and that the only matter on it which he had discussed with her was in relation to Ms Cassidy, but that on further questioning she accepted that they spoke on a regular basis at meetings or catch ups, and that she accepted that some of the issues in R34 had been discussed, and demonstrated a considerable knowledge about them.

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191. The Tribunal did not draw any adverse inference to the claimant's credibility on the basis of her answers about the contents of R34. She accepted that Ms Cassidy had spoken to Mr Chapman about concerns with Christina's payroll work, and that was relayed on to her by Mr Chapman. For the reasons outlined above the Tribunal did not conclude that such a discussion amounted to disciplinary action. The claimant accepted in cross examination that there had been discussions from time to time with Mr Chapman about some of the issues raised in R34, but her evidence was they had never been raised in the context of disciplinary proceedings, or a performance review, and she was completely unaware that matters identified in R34 were going to form part of

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the reason for her dismissal. She accepted that she was aware of some of the matters listed on R34, but, other than payroll for Christina's, not that they were issues, and the Tribunal found the claimants evidence on this convincing. While the claimant accepted that some of the matters on R34 had been discussed, there was no evidence as to how the discussions which did take place could be construed as a performance review of her work or some kind of disciplinary procedure.

192. The claimant did obtain alternative employment shortly after her employment with the respondents was terminated, however the Tribunal did not conclude that this was sufficient to give rise to the inference that she had engineered her departure from the respondents with a view to extracting a financial settlement from them. The Tribunal was satisfied that the claimant was genuinely distressed on her dismissal, which is inconsistent with the notion that she had somehow engineered it.

### **Submissions**

193. Both sides produced detailed written submissions, which are not reproduced here in full.

### **Respondents Submissions**

194. Mr Chapman submitted that the claimant had deliberately raised the claim to create problems for the respondent's business, and in order to extract a settlement, and he felt compelled to defend the respondent's position in light of the claimant's appalling conduct.

195. Mr Chapman took the Tribunal to each of the reasons for dismissal identified in the letter dismissing the claimant, and made submissions about how he said the evidence supported his position.

196. Mr Chapman produced an analysis of what he said was relevant and supportive evidence, and did this in respect of each of the reasons for dismissal.

197. In broad terms his submission was that the evidence of the witnesses supported the conclusion that the claimant had attended the office on 21 January, behaved in an entirely unacceptable manner, and was believed to be under the influence of drink or drugs.
- 5 198. In respect of the third reason for dismissal, Mr Chapman added to the reasons advanced in the letter of dismissal, the treat of non-attendance, in addition to the claimant's failure to attend work on 23 January, submitting the claimant had told him on 16 January that she did not want to come into work the following week. He referred to the evidence he considered supported this.
- 10 199. Mr Chapman submitted the claimant deliberately had not carried out a full payroll for several clients in December, and the one in particular was not happy with the situation.
200. He submitted the claimant had insisted on taking two weeks off at Christmas without permission and had deliberately neglected the payroll process for  
15 clients. Staff were incorrectly paid over the Christmas period as a result, and he referred the Tribunal to the evidence which he considered supported this.
201. Mr Chapman submitted he had been keeping a track record of the claimant's performance for a long time in a spreadsheet. Prior to her father leaving the business she was coping well. She was competent, and had been performing  
20 her role for nine years; ever since her father left the business, she started to make mistakes. That number of mistakes increased slowly, and the severity of the mistakes also significantly increased over time. He submitted that her actions caused monetary and reputational damage to the business and on numerous occasions he had to appease clients who were upset with mistakes  
25 and bad attitude. He submitted the claimant was deliberately making mistakes in order to create problems for his business and extract payment in settlement to exit the business. She was not prepared to leave without a large payoff resulting from her father giving her a year's notice.
202. In relation to the process which he had adopted, Mr Chapman referred to his  
30 evidence on this. He submitted that he had kept a log of the claimant's unprofessional behaviour for several months prior to January 2020. On 21

January she was sent home following appalling behaviour, and his initial assessment that she was drunk or on drugs and that she been told they would be discussing matters upon her return. He submitted he told her on 22 January that upon her return to the office they would hold a disciplinary meeting.

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203. Mr Chapman submitted that he conducted a full investigation following the events of 21 January, speaking to all the staff, and the cleaner, and reviewing his notes on the claimant's file to consider her actions which he had been keeping track of over a period of time. He submitted the claimant was aware that they were going to discuss matters upon her return, and that she had three days out of the office and ample time to consider an explanation of the events that had occurred. Mr Chapman submitted that the business followed due process in dismissing the claimant and that they acted in a reasonable manner in doing so, and he referred to his evidence about the procedure which was adopted.

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204. Mr Chapman referred to the size of the respondents, and the lack of internal HR Resource, which submitted should be taken into account in the event it was found there was a failure to follow the ACAS Code.

205. Mr Chapman submitted in the event that dismissal was found to be unfair, there should be a reduction to compensation on the grounds of *Polkey*.

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206. In relation to his *Polkey* defence, Mr Chapman asked the Tribunal to consider the claimant's evidence to the effect that when asked, even if she had been aware that the meeting on 24 January was a disciplinary meeting, would she still have felt wronged? To which she replied yes. That, Mr Chapman submitted this supported the conclusion that even if a fair procedure had been followed, the claimant would still have complained of unfair dismissal.

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207. Mr Chapman also submitted that the claimant contributed to her own dismissal, and he referred to Section 122 (2) and 126(3) of the ERA.

208. Mr Chapman submitted that the claimant's actions constituted a material breach of contract, and that she had breached the implied term of trust and

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confidence held to be implied within every contract of employment. He referred to the case of *Malik v BCCI SA in liquidation (1977) ICR 606* in this regard.

209. Mr Chapman also referred to the ACAS Code submitting the claimant was in  
5 breach of that code by failing to appeal, and that compensation should be reduced accordingly, up to 25%.

210. Mr Chapman submitted that the contract of employment was entered into under duress or undue influence. He was effectively told at the point of acquiring the business that he had to 'like it or lump it' in connection with the  
10 claimant's contract of employment which was forced upon. He submitted that the 12 month notice period was excessive and not fair

211. Mr Chapman then made submissions as to what he considered was inaccurate information in the ET 1 referring to evidence which he considered supported his position in relation to this.

15 212. Mr Chapman also asked the Tribunal to take into account other matters, including the manner in which the claimant's solicitor had behaved, and the fact that the case management PH the parties had been encouraged to use the services of ACAS by the Employment Judge but there had been no attempt to resolve the matter. He also submitted that the claimant was treated  
20 very well by him, but that the claimant could not continue to be employed because of reputational damage and loss to the business as a result of her actions.

213. Mr Chapman submitted the claimant had not mitigated her loss, and that he should be compensated for lost time, and loss of clients.

#### 25 **Claimant's Submissions**

214. For the claimant Ms Davies took the Tribunal to the background of the case, and the questions which she submitted the Tribunal would have to address in considering the claims of unfair dismissal and breach of contract.

215. She took the Tribunal through the evidence, highlighting the parts which she considered relevant. She took the Tribunal to the evidence which she said supported the claimant's position in relation to each of the reasons given for her dismissal in the dismissal letter.
- 5 216. She referred the Tribunal to the test in the case of *British Home Stores v Burchell 1980 ICR 303*, and took the Tribunal to each stage of the test. She also referred to *Sainsbury's Supermarkets Ltd v Hit 2003 (ICR)11* and *Iceland Frozen Foods Ltd v Jones 1983 ICR 17*.
- 10 217. Ms Davies submitted that the respondent's belief in the claimant's guilt was far from genuine, was not based on reasonable grounds, and was not reached following a reasonable investigation, and she addressed the Tribunal on each element of the test in *Burchell* with respect to each of the reasons given for the claimant's dismissal.
- 15 218. Ms Davis also submitted that in the event that the Tribunal was satisfied that respondents had established the reason for dismissal, the other tests in *Burchell* were not met. Dismissal was in any event out with the band of reasonable responses and was unfair. She also submitted that dismissal was procedurally unfair, as a result of the total lack of procedure.
- 20 219. In respect of the breach of contract lack/wrongful dismissal claim Ms Davies submitted there was no evidence to support the conclusion the claimant had acted in such a way as to justify summary dismissal, and she took the Tribunal through each matters in turn upon which the respondent relied, submitting that effectively there was no substance to any of.
- 25 220. In relation to remedy, Ms Davies submitted there should be an uplift of 25% because of the respondent's failure to comply with the ACAS Code. She submitted this to be no reduction in compensation grounds of *Polkey*. In relation to contributory conduct there should be either no reduction or failing that, a minimal reduction.
- 30 221. Ms Davies accepted that the statutory cap one year's pay applied to the assessment of the compensatory award, and she accepted that there should

not be double counting in respect of damages for breach of contract, and the compensatory award.

222. She submitted however that if the complaint of unfair dismissal and breach of contract was successful, then in assessing the compensatory award, mitigation is not taken into account in respect of an employee's notice periods in accordance with *Norton Tool Co Ltd v Tewson (1972) ICR 501* more recently approved in *Langley v Burlo (2007) ICR 390*.

## Consideration

### Breach of Contract Claim

223. The Tribunal firstly considered the claim for breach of contract.
224. The first issue for the Tribunal in considering this was to consider the terms under which the claimant was employed. Mr Chapman's position was that the claimant's contract was entered into on 1 August, very shortly before he acquired the business, and that the contract was 'forced' on him.
225. The claimant's contract of employment may have been entered into the day before Mr Chapman acquired the business, and he may not be happy about its terms, however the Tribunal was satisfied that Mr Chapman had legal representation at the point when he acquired the respondent business. Furthermore, he had negotiations with Mr McMillan about the notice provisions of the claimant's contract of employment as a result of which the period during which she was entitled to 12 months' notice was reduced. He was aware of the terms under which the claimant was engaged in terms of her notice period when he acquired the business. There was no basis upon which it could be said that this was a contract which had been entered into by the respondents under duress, as submitted by Mr Chapman.
226. The Tribunal was satisfied that the claimant was employed by the respondents under the terms of the written contract produced at C18, which contained a notice provision as set out above in the findings in fact.

227. That contract was signed on 1 August 2018. The claimant was dismissed in January 2020, which is within five years of the date of signing the contract, and therefore in terms of clause 12.1 of the contract the claimant is entitled to 12 months written notice of the termination of her employment.

5 228. The claimant did not receive 12 months written notice of the termination of the contract of employment and therefore the respondents were in breach of that term of her contract of employment, unless the employer can show that summary dismissal was justified because of the employee's breach of contract.

10 229. The question then is whether the claimant by virtue of her conduct was in breach of her contract of employment, justifying summary dismissal.

230. It is for the employer to prove that there was a repudiatory breach in order to justify summarily dismissing an employee. It is not enough for an employer to prove that they had a reasonable belief that the employee was guilty of gross  
15 misconduct; the Tribunal itself must be satisfied that the employee committed misconduct, and that the misconduct in question was sufficiently serious to amount to a repudiation of the contract.

231. In order for conduct to amount to repudiatory conduct, the employee's behaviour must disclose a deliberate intention to disregard the essential  
20 requirements of the contract.

232. Behaviours alleged against the claimant at the point of her dismissal are set out in the letter of dismissal.

233. In relation to the claimant's conduct on 21 January, the Tribunal's factual conclusions are set out above. The Tribunal considered all of the relevant  
25 facts and circumstances of the incident, which was of short duration. It took into account the claimant's conduct and what was said by the claimant and how that was said; that the claimant felt stressed and anxious and that she was on antidepressant medication; and that she sent an email to Mr Chapman early the following day, in which she acknowledged that her conduct had been  
30 unprofessional and there was no excuse for it. Having regard to these matters,

the Tribunal was not satisfied that the claimant's conduct on 21 January was such that it could not be said that it so undermined the trust and confidence inherent in a contract of employment that the respondents were no longer bound by it.

5 234. The Tribunal however did not just consider the events of 21 January, but also considered those events alongside all of the other matters for which the claimant was dismissed, and relied upon by Mr Chapman. It also considered Mr Chapman's overarching position that the claimant was guilty of deliberately making mistakes and acting in a manner calculated to force the respondents to make a financial offer to her in the knowledge that she enjoyed a 12 month notice period.

235. For the reasons given above the Tribunal considered that the claimant had not been given to prior verbal warnings.

15 236. It was not in dispute issue that the claimant did not attend work on 23 January. The Tribunal was satisfied the reason for her non-attendance was her ill health. For the reasons set out above, the Tribunal did not conclude that the claimant failed to contact the office to explain her reasons for not attending or failed to adhere to an absence reporting policy. The Tribunal did not conclude that there was any misconduct on the part of the claimant as a result of events of the 23 January.

20 237. The Tribunal did not conclude that the claimant has spoken unprofessionally to a client telling them that she was prone to make mistakes. It did conclude that she told Ms Cassidy that she should check information sent to her. The Tribunal was satisfied that this was explained by the difficulties inherent in carrying out the payroll work for Christina's, and that the claimant was under pressure in performing this work. This conclusion is supported by the evidence of Ms Cassidy who said that when she spoke to Mr Chapman about the claimant, she was doing it because she was concerned about the claimant. The Tribunal concluded that this, at best, was a performance rather than a conduct issue.

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238. The Tribunal was unable to conclude that by virtue of her actions, the claimant left the clients staff without pay for the period when she was on holiday. The Tribunal concluded that the way in which the claimant dealt with Christina's payroll for the month of December was not in line with the protocol which Mr Chapman had agreed with Christina's. The explanation for that however that the claimant had processed the payroll for Christina's for the first three weeks in December, in accordance with the client's instructions. Furthermore, the claimant had told Mr Chapman that the protocol would not work, and that Ms Cassidy had also expressed reservations about it to the extent she could not guarantee she would supply the payroll information in line with the protocol. The claimant's following a client's instructions in this way, and in so doing, departing from a protocol which both she and the client had told Mr Chapman may not always be operable, could not be regarded as a serious conduct issue.
239. For the reasons given above the Tribunal did not conclude the claimant had misplaced £4,000 from client's bank account.
240. For the reasons given above the Tribunal did not conclude that the claimant continually gave away her time for free despite being told not to.
241. The Tribunal did not conclude could that the number and the severity of mistakes the claimant had made progressively increased over time, or that Mr Chapman had on numerous occasions to appease clients who were upset with her bad mistakes and bad attitude. While there was evidence that the claimant had from time to time made mistakes in her work there was nothing persuasive before the Tribunal to suggest that these were deliberate on her part, or that the number of her mistakes was increasing, and the Tribunal did not conclude that on the occasions when the claimant did make mistakes, that these were deliberate on her part. Errors made by the claimant relied upon by Mr Chapman were evidenced by an email chain from December 2019, (R19 to 23), which deals with what appears to be day-to-day operational matter which the claimant has remedied, and in respect of which no action was taken against her. In his cross-examination of Mr Thompson, Mr Chapman referred to an email which suggested members of Mr Thompson's staff not been paid

(R24). This however not put to the claimant, and therefore the Tribunal was not in a position to reach any conclusions as to what if any significance this had in terms of the claimant's conduct.

5 242. The Tribunal did not conclude that the claimant had cancelled the respondents organised outsourced resource. While the Tribunal was satisfied that the claimant had told her father she would feel emotional about him working there, it was equally satisfied that it was Mr McMillan's decision not to provide consultancy services in January, and not that the claimant had cancelled his engagement.

10 243. The Tribunal did not conclude that the claimant passed on a client's confidential bank information. It was satisfied the claimant legitimately provided Mr McArthur with Mr Thompson's banking information to allow the respondents to carry out work for Mr Thompson. For the reasons given above the Tribunal was not satisfied that the claimant had been told by Mr Chapman  
15 that she must not pass this information on to anyone. In support of his position that the claimant was breaching an Accountancy Ethical Coode, Mr Chapman relied on Mr McArthur's evidence to the effect that it was unusual, and that in his professional opinion he would not want his banking details sent via email. He also relied on Mr Thompson's evidence to the effect that he had not directly  
20 authorised Mr Chapman to have access to his bank account.

244. Mr McArthur's opinion was not a matter to which the Tribunal can attach any significant weight, particularly in the absence of the provision of the terms of the Code upon which Mr Chapman relied. Mr Thompson's evidence was that he had not authorised Mr Chapman personally to have access to his bank  
25 account; he thought he was authorising Tax Assist to have such access.

245. There was no basis upon which the Tribunal could conclude that in passing on this information to a college, which was necessary to the completion of the client's work, that the claimant was in breach of any professional code of practice. Mr Chapman asserted that the claimant was in breach of an  
30 Accountancy Code of Practice or Ethics, but beyond his unsubstantiated

assertion that that was the case, there was no nothing before the Tribunal to allow it to reach the conclusion that it was.

- 5 246. For the reasons given above the Tribunal did not conclude that the claimant took action to prevent a client (Mr Thompson) from accessing his bank account.
247. The Tribunal also considered the matters raised in evidence and identified on R 34.
- 10 248. The factual conclusions on those matters are set out above. There was no evidence upon which to conclude that the claimant was not managing debtor value; that she took holidays without permission; that clients left because of the mistakes causing a loss of £4,000 recurring annual business; that the client 'on boarding work' was massively behind schedule; or that there was poor management of Mr Chapman's diary.
- 15 249. The Tribunal did conclude that the claimant did not shred files, but was satisfied that she had a good reason for not doing so.
250. The Tribunal also considered Mr Chapman's overarching position that the claimant was deliberately making mistakes with a view to forcing the respondents into making her a financial settlement.
- 20 251. There was no evidence before the Tribunal upon it could conclude that the claimant was deliberately making mistakes with a view to forcing the respondents to make a financial settlement. The Tribunal's conclusions as to the errors which the claimant did make as set out above; those facts were not capable of giving rise to an inference that the claimant was acting deliberately in order to engineer a particular outcome. The Tribunal is supported in its conclusion, in that it accepted as entirely genuine the claimant's shock and distress upon being dismissed.
- 25 252. The Tribunal considered whether the claimants conduct cumulatively was severe enough amount to conduct which was a repudiation of the contract. Taking account of the facts and circumstances surrounding the events of 21 January which are dealt with above, and the facts and circumstances
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surrounding the remainder of the claimants conduct which the Tribunal found to have occurred as outlined above, the Tribunal did not conclude that the claimant was guilty of conduct which breached the implied obligation of mutual trust and confidence and was severe enough to justify summary dismissal.

- 5 253. The effect of that conclusion is that the respondents in dismissing the claimant without notice, acted in breach of contract and the claim for damages for breach of contract succeeds. The remedy to which the claimant is entitled is dealt with below.

### Unfair Dismissal Claim

- 10 254. An employee has a right not to be unfair dismissed in terms of section 94 of the Employment Rights Act 1996 (the ERA).

Section 98 of the ERA provides;

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

- 15 (a) *the reason (or if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of the kind such as to justify the dismissal of an employee holding position which the employee held.*

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(1) *A reason falls within this subsection if it-*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*

- 25 (b) *relates to the conduct of the employee*

(c) *.....*

255. If the Tribunal is satisfied that dismissal was for a potentially fair reason, it has to consider whether dismissal was fair or unfair in terms of section 98 (4) of the ERA which provides;

5           *Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

10           (i) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

              (ii) *shall be determined in accordance with equity and the substantial merits of the case.*

257. The respondent's position is that the claimant was dismissed for a conduct related reason.

15 258. The respondents rely on multiple reasons for dismissing the claimant. The Tribunal understood Mr Chapman's position to be that all the reasons were significant, justifying dismissal, with the claimants conduct on 21 January perhaps having slightly more significance than the others. In such a case, the Tribunal must examine all the complaints together because they compromise  
20 the reason for dismissal.

259. The Tribunal had regard to the well-known case of *British Home Stores v Burchell 1980 ICR 303* which laid down the tests applicable in a misconduct dismissal. What was said in that case was;

25           *'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First  
30 of all, there must be established by the employer the fact of that belief;*

5           that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all circumstances of the case’.

260. There are therefore three limbs to the test set down in *Burchell*.

261. The first is that the employer believed in the claimant’s guilt.

10       262. The second is that it had in mind reasonable grounds upon which to sustain that belief.

263. The third stage is when that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

15       264. The burden of proof rests with the respondent only at the first stage of this test, to establish the reason for dismissal. Thereafter in considering the second and third limb of the test the burden of proof is neutral.

265. The Tribunal also reminded itself that it should apply the objective test of a reasonable employer to its consideration of the procedural aspects of the dismissal, as well as the reasonableness of the decision to dismiss.

20       266. The Tribunal began by addressing the second and third limb of the *Burchell* test.

25       267. No investigation took place with the claimant. The Tribunal was satisfied that the claimant did not have sight of R34 in the course of the disciplinary hearing, and did not have the opportunity to comment on that, or on any of the reasons for which she was dismissed.

268. Mr Chapman submitted the claimant was aware of the issues in R34 which had been discussed on an ongoing basis. However, there was nothing to suggest that to the extent the claimant was aware of the issues, that had they been raised with her in a disciplinary or a performance review context.

269. Applying the objective standard of a reasonable employer an investigation reasonably involves the employer putting the conduct of which the employee is accused in misconduct proceedings to the employee in order to have his or her comment on it. Such a process is inherent in the ACAS Code of Practice on Disciplinary and Grievance Procedure (the Code).  
5
270. The claimant was not given the opportunity to comment on the allegation that she failed to attend work on 23 January without emailing or contacting the office. Mr Chapman did not have reasonable grounds on which to form a reasonable belief that the claimant failed to attend work on 23 January without explanation, in circumstances where the claimant had as a matter of fact spoken to Mr MacArthur, and asked him to pass on to Mr Chapman that she was able to attend work because of ill health, and he had done so.  
10
271. There were no reasonable grounds upon which to form the belief that the claimant was guilty of excessive and deliberately poor performance at work. That allegation was never put to her. None of the specific charges contained in the letter of dismissal under that heading were put to the claimant.  
15
272. Ms Cassidy had not complained to Mr Chapman about the claimant speaking to her unprofessionally and the claimant was denied the opportunity of explaining that she had not told Ms Cassidy that she was prone to making mistakes. The claimant accepted that she had told Ms Cassidy should check her work (albeit this was not investigated) but there was no reasonable investigation and no reasonable grounds upon which to conclude that the claimant behaved in the manner she was accused of.  
20
273. The claimant did not have the opportunity of explaining that she had processed the payroll for Christina's in a particular way in December in compliance with the client's instructions. No reasonable investigation took place and there was no reasonable basis upon which to conclude that the claimant had not processed payroll leaving client staff without pay for the period when the claimant was on holiday.  
25
274. The claimant had not as a matter of fact misplaced £4,000 of clients' money from their bank account, and therefore there was no reasonable grounds upon  
30

which conclude that she had done so. There was no investigation of this whatsoever with the claimant.

275. The Tribunal was not satisfied as a matter of fact Mr Chapman had continually told the claimant that she should not give time away for free, and there was  
5 no reasonable grounds upon which he could conclude that she had done so, despite being told not to.

276. No reasonable investigation was carried out into the allegation that the claimant had cancelled organised outsource. It was unreasonable, applying an objective standard, to reach that conclusion in the absence of obtaining  
10 comment from the claimant, or of enquiring of Mr Macmillan why he had cancelled his engagement. In the absence of such investigation there were no reasonable grounds upon which Mr Chapman could conclude that the claimant had cancelled Mr MacMillan.

277. There are no reasonable grounds for concluding the claimant committed an  
15 act of misconduct in passing on confidential banking information. Firstly, the Tribunal was not satisfied that Mr Chapman had told the claimant that Mr Thomson's bank details were never to be shared with anyone else including him without the express permission of the client. Secondly, applying an objective standard it was unreasonable for Mr Chapman to rely on his own  
20 unsubstantiated assertion that a Code of Practice or Ethics had been breached by virtue of the claimant passing on Mr Thompson's bank details to a colleague for the purpose of completing work for that client, which the respondents were instructed to carry out. No code of practice or ethics was put to the claimant for comment. While the claimant had disclosed  
25 confidential banking information to one of her colleagues, there were no reasonable grounds for concluding that this amounted to an act of misconduct.

278. There were no reasonable grounds for concluding that the claimant had taken  
30 action to prevent a client from accessing his bank account. While the respondent's may have a difficulty in processing the payroll for Mr Thompson's staff after the claimant was dismissed because they could not

access his bank account, there was no investigation of this matter whatsoever with the claimant, and she did not have the opportunity putting forward the reasonable explanation set out above are the findings in facts to explain the difficulties that were experienced in accessing Mr Thompson's account.

5 279. In relation to the events of 21 January the Tribunal was satisfied that Mr Chapman carried a degree of investigation into the events by asking other employees in the office what they saw happen on 21 January. His investigation however did not involve any input from the claimant, and applying an objective standard such an investigation which did not afford the  
10 claimant the opportunity to explain her actions or advance any mitigation, falls out with the band of reasonable responses. This is particularly so, as there was no investigation with the claimant of the allegation that she was under the influence of drugs or alcohol. It was unreasonable for Mr Chapman to form that belief based on his own opinion, and the subjective opinions expressed  
15 by others, without any investigation of this with the claimant.

280. Applying the objective standard of a reasonable employer, at the point when he formed his belief in the claimant's guilt Mr Chapman has not carried a reasonable investigation, and his belief in the conduct for which the claimant was dismissed was not formed on reasonable grounds.

20 281. Nor was the Tribunal satisfied that the respondents had established the reason for dismissal. The employer does not have to prove that the reason actually justified dismissal, as this is a matter which the Tribunal assesses when considering the question of reasonableness. At the stage of considering whether the respondent has established the reason for dismissal, it is  
25 sufficient that the respondent genuinely believed the claimant guilty of misconduct on the reasonable grounds. There were no reasonable grounds for Mr Chapman's belief in the claimant's guilt of all the misconduct for which she was dismissed and the Tribunal was not satisfied that Mr Chapman held a genuine belief in the claimant's guilt of all of the misconduct for which  
30 she was dismissed, and the respondents therefore failed to establish the principle reason for dismissal.

282. In any event, even if Mr Chapman had made out the reason for dismissal, the procedure adopted by him in dismissing the claimant fell out with the band of responses which a reasonable employer would have adopted and did not meet the tests laid down in *Burchell*. Dismissal of the claimant was substantively and procedurally unfair, and her claim for unfair dismissal succeeds.

## Remedy

### Breach of Contract - Remedy

283. The claimant is entitled to damages for breach of contract in that she was dismissed without notice. In terms of her contract she was entitled to 12 months' notice. Ms Davis submitted the claimant was entitled to a year's salary of £35,00 in respect of damages for breach of contract, subject to any mitigation by way of earnings during the notice period, and the Tribunal accepted that submission.

284. Ms Davis also accepted that the claimant is not entitled to double counting when assessing her award for breach of contract and the compensatory award for unfair dismissal, and that in the event the claim for unfair dismissal succeeds, then credit has to be given for the amount awarded in respect of the damages period, subject to the principles in the case of *Norton Tool v Tewson 1972 ICR 150* which are dealt with below.

285. Ms Davis also accepted that the statutory cap one year's pay applied to the breach of contract/compensatory award in the unfair dismissal claim.

### Unfair Dismissal - Remedy

286. The claimant is entitled to a basic award based on her age and length of service at the date of dismissal.

287. For the reasons given above, the Tribunal was satisfied that the claimant's employment commenced on 1 September 2010, and ended 29 January 2020; she therefore had nine years' service. The claimant was 36 years of age at

the date of dismissal. The claimant's pre dismissal earnings were agreed at £35,000 per annum.

288. The basic award is calculated on the basis of the claimant's gross pay, which is £637.08 per week but limited by the statutory cap on a week's pay of £525.

5 289. The basic award is therefore **9 x £525 = £4,725.**

290. The claimant is also entitled to a compensatory award

291. Before considering the financial aspects of the compensatory award, the Tribunal considered whether there should be any adjustments to it in principle on the basis of the following, and in the following order:

10 (1) Deduction of sums earned by way of mitigation – Section 123 (4) of the ERA.

(2) 'Just and equitable' reductions based under section 123(1) of the ERA, including reductions in accordance with the principles to be derived from the case of *Polkey v AE Dayton Services Ltd ICR 124 HL*.

15

(3) Increase or reduction of up to 25% as a result of the employer or employee having failed to comply with a material provision of the ACAS code of practice

(4) Percentage reduction for the employees' contributory fault – Section 123 (6) of the ERA

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(5) Application of the statutory of one year's salary – Section (124) of the ERA.

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292. **Section 123 (4).** Ms Davies's submission was that the principles to be derived from the case of *Norton Tool v Tewson 1972 ICR 150* should apply in this case.

293. The decision in *Norton Tool* was that an employee who has been unfairly dismissed without notice, and has taken up new employment during what would have been notice period, is entitled to recover a sum equivalent to



notice pay as part of his or her unfair dismissal compensation without giving credit for the monies he or she earned from that new employment.

294. The effect of that legal principle in this case is that the compensatory award reflects the notice period of 12 months' pay, no credit is given for monies earned by the claimant during her notice period, and therefore no deduction is made from the compensatory award under section 123 (4) of the ERA.
295. **Polkey Reduction.** The Tribunal considered whether there should be any reduction to the compensatory award from the application of the principles to be derived from the case of *Polkey*. Tribunals are entitled to reduce the amount of the compensatory award in circumstances where the dismissal is found to be unfair by reason of a procedural failure by the employer. The amount of any reduction depends on an assessment by the Tribunal of likelihood that, had the procedural irregularities not occurred, the employee would still have been dismissed.
296. Mr Chapman submitted that even if he had followed a fair procedure, the claimant confirmed that she would still have felt wronged and claimed unfair dismissal. That however is not the relevant question.
297. In considering whether to make a *Polkey* reduction the Tribunal has to consider from the evidence what potentially fair reason for dismissal, if any, might have emerged as a result of proper investigation and disciplinary process? It then has to consider whether depending on the principal reason for a future hypothetical dismissal, would dismissal for that reason be fair or unfair. If appropriate the Tribunal has to go on to consider the % chance that dismissal would have occurred.
298. The disciplinary process which the respondents carried out was entirely deficient for the reasons set out above, however the Tribunal was satisfied on the basis of the evidence that there had been a workplace incident 21 January, in which the claimant had behaved unprofessionally and that this would have emerged in the course of proper investigation and disciplinary process. Given that there were no reasonable grounds for concluding the claimant was guilty of any other conduct for which she was dismissed, the

Tribunal was not able to conclude that any other conduct matters would have emerged as a result of a proper disciplinary and investigative process.

299. The Tribunal then considered whether dismissal by reason of the claimant's conduct on 21 January would have been fair or unfair. Applying the objective test of a reasonable employer, dismissal for a workplace incident where the claimant answered Mr Chapman back in a raised voice in an unprofessional manner, but provided an explanation and acknowledgement that her conduct was unprofessional the following day, and would have been able to explain mitigating circumstances, would have been unreasonable and fallen out with the band of reasonable responses open to the employer, and therefore the Tribunal concluded that if a fair procedure had been adopted the claimant would not have been dismissed. The effect of that conclusion is that there should be no reduction to the compensatory award in line with the *Polkey* principles.

300. **ACAS Code.** The Tribunal also considered whether there should be any uplift or reduction to the compensatory award because of a failure to comply with the ACAS Code. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) provides that if an employer has failed to comply with ACAS code and the failure is unreasonable, the employment Tribunal may, if it considers just and equitable in all circumstances increase any award it makes to the employee by no more than 25%. Section 207A (3) contains effectively the same provision in relation to any failure by an employee.

301. The ACAS Code provides that the employer must establish the facts of each case; inform the employee of the problem; meet with the employee to discuss the problem; allow the employee to be accompanied at the meeting; decide on appropriate action, and provide employees with an opportunity to appeal.

302. The Tribunal concluded there was a breach of the ACAS Code in that the claimant was not informed of the problems, a meeting was not held at which those problems were discussed; and she was not accompanied at a meeting at which she was dismissed.

303. The Tribunal was satisfied that there was an unreasonable failure to comply with the ACAS Code on the part of the respondents. In reaching this conclusion, the Tribunal takes into account that the employer was relatively small, and did and not benefit from internal HR advice; it was however a professional services firm, and Mr Chapman struck the Tribunal as an able individual who would have been in a position to research matters or obtain advice so as to be aware of the basic fairness requirements of a dismissal procedure.
304. The Tribunal considered that it was just and equitable to uplift the award by 25%. In doing so it again takes into account the size and administrative resources of the respondents undertaking, however it also takes into account the extent of the breach. There was a significant breach of the ACAS code in that the claimant was summarily dismissed, without being given the opportunity to comment on the conduct for which she was dismissed.
305. Mr Chapman suggested there should be a reduction in compensation because the claimant failed to appeal the decision to dismiss. Failure to appeal a dismissal decision is a breach of the employees' obligations under the Code, however the Tribunal did not consider that the claimant's failure to appeal was unreasonable, in circumstances where she had been summarily dismissed for reasons of which she had no notice, and was told the right of appeal was to Mr Chapman, who had made the decision to dismiss in the first place. The Tribunal therefore did not consider that it was just and equitable that there should be a reduction to the compensatory award on the basis of the claimant's failure to comply with it the Code to the extent she did not lodge an appeal against the decision to dismiss.
306. **Contributory Conduct.** The Tribunal's considered whether there should be a reduction to the compensatory award on the grounds that the claimant by her conduct contributed to her dismissal.
307. In considering whether to make reduction under section 123 (6) of the ERA the Tribunal has to find that the relevant action was culpable or blame worthy,

and that it caused or contributed to the dismissal, and that it must be just and equitable to reduce the award by the proportion specified.

5 308. The Tribunal was satisfied that the claimant had raised her voice to Mr Chapman in the course of a workplace dispute on 21 January, and had answered him back in a manner which was unprofessional. The Tribunal was satisfied that such conduct was culpable and blameworthy, and that it contributed to the claimant's dismissal. Albeit the claimant was dismissed for a multitude of reasons, it was the events of 21 January which sparked off that process.

10 309. The Tribunal then considered to what extent it was just and equitable to reduce compensatory award.

15 310. The Tribunal considered that the claimant's conduct was only a small factor in respondent's decision to dismiss her. The respondents bore to dismiss the claimant for a multitude of reasons, and the conduct which was attributed to her on 21 January in the dismissal letter was exaggerated. The Tribunal was satisfied that the claimant's conduct was explained to a significant degree by the fact that she felt stressed and anxious on the morning of 21 January and it takes that into account; it also takes into account that she acknowledged her shortcomings to Mr Chapman, the following day. Taking account of these factors, the Tribunal was satisfied that it was just and equitable to reduce the compensatory award by a very small amount and assessed that at 10%.

20 311. Under section 122 (2) the Basic Award can be reduced where the employees conduct before dismissal makes it just and equitable to do so. For the reasons which are set out above the Tribunal found conduct of the claimant prior to dismissal blameworthy and, on the same basis as set out above, it considered it just and equitable to reduce the Basic Award by 10%.

25 312. Lastly the Tribunal applied a statutory of one year's pay (£35,00) to the compensatory award.

313. The uplift of 25% on the compensatory award as a result of the respondent's failure to follow the ACAS code is offset to the extent of 10% on the basis of the claimant's contributory conduct.

5 314. Both of these assessments are however academic for the purposes of calculating the actual amount of the compensatory award, as the statutory cap of one year's pay applies to the compensatory award and therefore the maximum which can be awarded as £35,000.

10 315. The claimant is also entitled to compensation for loss of statutory employment rights which are dependent on her having remained in employment for a qualifying period, and which the Tribunal assessed at £500.

15 316. Ms Davies accepted that there could not be double counting for the damages for the claimant's successful breach of contract and unfair dismissal claims, and therefore the practical effect of this is that the damages award for breach of contract and unfair dismissal which the Tribunal shall make to the claimant is as follows;

Basic award (£4,725- 10%)	£4,249.50
Compensatory award	£35,000
Loss of Statutory Rights	£500
Total	<b>£39, 749.50</b>

20 317. The Tribunal notes that Ms Davies in her schedule of loss advanced a claim for two weeks' pay for breach of Section 10 of the Employment Relations Act 1999. This was not a claim which was contained in the ET1 and therefore the Tribunal declined to make an award in respect of that.

25 318. In the event the claimant was successful, Mr Chapman asked for favourable terms in order to pay compensation over a period of time. It is not in the Tribunal's gift to make such an order.

319. Other matters raised by Mr Chapman included the claimant's solicitor's conduct; that is not a matter for this Tribunal. Nor is whether the claimant or her solicitor did or did not engage in settlement discussions.

5 320. Mr Chapman submitted that the claim was vexatious, and he sought compensation for loss of clients and lost time. Clearly, the Tribunal did not conclude that the claim was vexatious; there is no counterclaim for losses sustained by the respondent before the Tribunal.

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Employment Judge: Laura Doherty  
Date of Judgment: 25 November 2020  
Entered in register: 04 December 2020  
15 and copied to parties

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